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ABSTRACT

Section B of the Media and Law section of the proceedings contains the following nine papers: "The Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine" (Harry W. Stonecipher and Don Sneed); "The Anti-Federalists and Taxation under the Free Press Clause of the First Amendment" (Brad Thompson); "Independent State Constitutional Analysis in Defamation Litigation: State High Court Decisions, 1986-1991" (James Parramore); "(Don't) Express Yourself: Can State Constitutions Protect Freedom of Speech and the Press during the Rehnquist Years? A 50-State Survey of Free Speech Provisions and a Digest of Selected States and How They Might Fare" (Nancy K. Bowman); "Inquiring Minds Have a 'Right' to Know: The Role of Tautology in Private Facts Cases" (Elizabeth M. Koehler); "Ideological Exclusion of Foreign Communicators: The Lingering Shadow of a McCarthy Era Xenophobe" (Yuming J. B. Hu); "Supreme Court Justice Sandra Day O'Connor's First Amendment Approach to Free Expression: A Decade in Review" (Robyn S. Goodman); "The Scope of Independent Appellate Court Review in Public Figure Libel Cases" (Paul Driscoll); and "Broadcasters and Non-Compete Clauses: Win, Lose or Draw a Lawsuit" (Sue Carter). (RS)

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Part V: Media and Law, Section B.

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The Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine

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The Professional Person as Libel Plaintiff: Reexamination of the Public Figure Doctrine

This paper reexamines the public figure doctrine in cases involving alleged defamation of members of the "learned professions," namely, lawyers, teachers, doctors and clergymen whose livelihoods depend heavily on maintenance of their reputations. Thirty-nine cases brought since 1982 are studied in an effort to clarify who and under what circumstances such professional libel plaintiffs are deemed to be public figures and thus subject to the New York Times "actual malice" standard. The paper concludes with a call for the need for a U. S. Supreme Court ruling that establishes guidelines - such as those outlined in Waldbaum v. Fairchild Publications, Inc. - to better define public figures in keeping with the Supreme Court's classification.

THE PROFESSIONAL PERSON AS LIBEL PLAINTIFF:

REEXAMINATION OF THE PUBLIC FIGURE DOCTRINE

A dominant question in libel litigation during the past decade has been the determination of who is a public figure for the purpose of applying the "actual malice" standard of liability.[1] The underlying principle that has spawned the public figure question is that if an individual is found to be a public figure then that individual may recover in a libel action only upon proof of actual malice, i.e., knowledge of falsity or reckless disregard of whether a statement is true for false.[2]

On the other hand, the libel plaintiff who is determined to be a non-public figure, i.e., a private individual, while required to prove some "fault" on the part of the defendant to establish liability,[3] the U.S. Supreme Court has left it to the state courts to establish the appropriate standard of fault. The majority of states, following the lead of the Supreme Court, has adopted the lesser standard of negligence, defined variously by the lower courts, as the minimum standard that private persons must prove to win a libel verdict.[4] Such a lesser standard, of course, makes it more difficult for media defendants to ward off libel suits filed by private individuals, placing even greater importance upon the determination of who is and who is not a public figure.

In applying the public figure doctrine, cases involving alleged defamation of members of the "learned professions," namely, lawyers, teachers, doctors, and clergymen, appear to be particularly troublesome.[5] The special relationship of members of the learned professions to their publics and the importance of reputation in maintaining those relationships tend to make news coverage of the activities of professional persons particularly sensitive.

One survey, for example, concludes that the clergy's position in libel litigation vis-a-vis the defendant is more favorable than that of most other types of plaintiffs.[6] It has also been noted that for the press to stir up a debate or engage in community discussion of whether its teachers can teach is risky because application of the public figure doctrine to public school teachers is in "chaos."[7] This interest of lawyers, doctors, teachers and clergy in their professional reputation is reflected in the common law rule making the dispargagement of another in the conduct of his business, trade or profession actionable.[8]

And the Restatement (Second) of Torts, using physicians as an example, states that "When peculiar skill or ability is necessary, an imputation that attributes a lack of skill or ability tends to harm the other in his business or profession."[9]

But at best, as one media law attorney has pointed out, determining who is and who is not a public figure is "an inexact science."[10] Not only are cases involving similar facts sometimes decided differently by courts in different jurisdictions,[11] differing factual circumstances involving similar plaintiffs may result in the application of the public figure doctrine in ways which appear inconsistent. Physicians involved in a professional dispute whether specialists in otolaryngology should perform plastic surgery, for example, were found not to be public figures in their libel action against authors of a medical journal article.[12] On the other hand, an obstetrician who testified before the Food and Drug administration about the perceived dangers of the drug Bendectin was found to be a public figure.[13]

This paper will first examine the various categories of public figures as set out by the Supreme Court in Gertz v. Robert Welch, Inc.,[14] and in subsequent court decisions. An analysis will then be made of the efforts by two lower courts to establish guidelines to better define public figures in keeping with the Supreme Court's classification. Finally, an examination will be made of some thirty-nine reported libel cases brought by ministers, lawyers, doctors, and teachers since 1982 in an effort to clarify who and under what circumstances such professional libel plaintiffs are deemed to be public figures and thus subject to the New York Times actual malice standard.

I. THE SUPREME COURT REDEFINES "PUBLIC FIGURE"

The structure of libel law changed drastically in 1964 when the Supreme Court held in New York Times Co. v. Sullivan that First Amendment principles required that a public official must show "actual malice" in order to recover damages for a defamatory publication concerning his official conduct.[15] Three years later the Court extended the actual malice standard to public figures--persons in the public eye without status--in the consolidated cases of Curtis Publishing Co. v. Butts and Associated Press v.

Walker.[16] In a plurality opinion the Court stated that a person could obtain public figure status through "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[17]

In 1971 the Supreme Court shifted its approach from an emphasis upon the status of the libel plaintiff when a plurality of the Court in Rosenbloom v. Metromedia, Inc., applied the actual malice test "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[18] This "public interest" approach permitted the media defendant to have a greater role in the determination of those who would be burdened with the fault standard previously reserved for public officials and public figures.[19] Just three years later, however, the Court in Gertz v. Robert Welch, Inc.,[20] abandoned the Rosenbloom public interest doctrine and attempted, once again, to delineate the types of persons who were to be given public figure status.

The Gertz Court, for example, stated that those who by reason of "the notoriety of their achievements or the vigor and success with which they seek the public's attention" are properly classed as public figures. Public figures, the Court observed, generally "have assumed roles of special prominence in the affairs of society" and to have "assume [d] special prominence in the resolution of public questions."[21] The Court further held that such public figures may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falstiy or with reckless disregard for the truth.[22]

Two categories of public figures were defined by the Gertz Court. The first, the "pervasive" or "all purpose" public figure category includes those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[23] A media attorney suggested in 1980 that Ralph Nader, Jane Fonda, and Angela Davis might fall into such a category.[24] Another legal scholar has questioned a constitutional standard that would dump such general public figures as Reggie Jackson, Michael Jackson, and Leonard Bernstein in "the same hopper" with such public officials as Ronald Reagan, Jesse Helms, and Harold Washington (the late Mayor of Chicago).[25]

The second category defined by the Gertz Court is the "vortex" or "limited purpose" public figure, those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[26] By voluntarily propelling themselves into such controversies the limited purpose public figure invites attention and comment. And while "it may be possible for someone to become a public figure through no purposeful action of his own," the court noted that "the instances of truly involuntary public figures must be exceedingly rare."[27]

In applying its new public figure delineation, the Court found that plaintiff Elmer Gertz, a Chicago attorney who had been active in civil and professional affairs, was not a public figure in the libel action brought as the result of an article in American Opinion, a John Birch Society publication. The Court observed that Gertz did not thrust himself into the public spotlight nor did he achieve "general fame or notoriety in the community.[28] In three subsequent libel cases, the Supreme Court has found that Mary Alice Firestone,[29] Ronald Hutchinson,[30] and Ilya Wolston,[31] while all relatively public people, nevertheless did not fall into the vortex or limited purpose public figure category.

In Firestone the Court ruled that a cause celebre divorce in Florida involving a prominent and wealthy couple was not a public controversy. Moreover, the Court noted that the fact Mrs. Firestone sought to obtain marital redress through a court proceeding was not the kind of voluntary act or assumption of prominence in the resolution of public questions as to render her a public figure.[32]

In Hutchinson the Court ruled that becoming the recipient of Senator William Proxmire's Golden Fleece Award as a result of being funded for federal research projects did not make the plaintiff a limited purpose public figure. And though Hutchinson was a writer for professional journals, the Court observed that he did not thrust himself or his views into the public eye to influence others, nor did he invite public attention or have regular and continuing access to the media.[33]

In Wolston the Court ruled that a person was not a public figure merely because he refused to appear before a grand jury, fully realizing that his refusal might attract publicity because he was believed to have information of interest to the government relating to Soviet espionage in the United States, the Court noted that Wolston was dragged unwillingly into the controversy.[34]

One legal authority has observed that the Supreme Court has generally rejected the notion that mere involvement in public events is sufficient, holding rather that to become a public figure for a limited range of issues a libel plaintiff must thrust himself into a controversy as substantial as a public debate.[35]

In a more recent case, Hustler Magazine v. Falwell,[36] the Supreme Court observed that Jerry Falwell, a nationally known minister and commentator on politics and public affairs, "is concededly a public figure" and was therefore subject to the actual malice standard in his claim of intentionally inflicting emotional distress upon the publisher of Hustler magazine.[37] Though all the courts involved failed to elaborate, it is generally assumed that the "Reverend Falwell has been the central focus of abiding public interest and concern, and he has aggressively nurtured the public spotlight to promote and disseminate his personal views to as wide an audience as possible."[38]

These four post-Gertz cases are the sum total of the guidance the Supreme Court has afforded to lower courts seeking to apply the Gertz standards in an effort to determine who is and who is not a public figure for the purpose of applying the New York Times fault standard.[39]

II. JUDICIAL ATTEMPTS AT ESTABLISHING GUIDELINES

Two years after the Supreme Court's reformulation of the public figure doctrine in Gertz a federal district judge lamented that the process of defining a public figure was "much like trying to nail a jellyfish to the wall."[40] The federal appellate court that reviewed the case said that the public figure concept "has eluded a truly working definition" and "falls within that class of legal abstraction where 'I know it when I see it.'"[41] A prominent media attorney, examining cases reported prior to 1980, concluded that "as of this writing, the law as to the definition of 'public figure' is murky indeed."[42] In a case that seems to epitomize the confusion of the lower courts in defining who is and who is not a public figure, the Supreme Court of Kansas ruled that while a lawyer representing a criminal defendant was an all purpose public figure because of his community activities, he was not a vortex public figure with respect to criminal defense of a woman on trial for first degree murder.[43] The Kansas high court's ruling seems, at best, to be a confusing application of the Gertz categorical definitions of the two primary types of public figures.

In a 1980 libel case, Waldbaum v. Fairchild Publications, Inc.[44] the U.S. Court of Appeals, District of Columbia, noting that the Supreme Court had, unfortunately, not "fleshed out the skeletal descriptions of public figures" enunciated in Gertz, responded to that challenge. The court observed that clear guidelines in applying the public figure doctrine were important for both the press and the public. If such guidelines are not clear to the press, the dissemination of information and ideas otherwise protected might well be suppressed through self censorship. Clarity is likewise important to members of the public generally, any one of whom might become the subject of a defamatory publication should he choose to participate in the public arena.[45]

The court in Waldbaum noted that after it is determined that a libel plaintiff is not a general purpose public figure (and few people have been found to attain such general notoriety) the court must then examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation" at issue.[46] The court then set out a three-step approach for detemining who is and who is not a vortex or limited purpose public figure.

"As the first step in its inquiry, the court must isolate the public controversy."[47]

The court noted that a public controversy is not simply a matter of interest to the public; it must be a legitimate dispute, the outcome of which affects the general public or some segment of it in an appreciable way. Observing that essentially private concerns or disagreements do not become public controversies simply because they attract attention, the court reasoned that "Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants."[48]

"Once the court has defined the controversy, it must analyze the plaintiff's role in it."[49]

"Trivial or tangential participation" is never enough. The court noted that the language of Gertz was clear that plaintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution. They must have achieved a "special prominence" in the debate. The court explained:

> The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have had an impact on its resolution. In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage and the public reaction to his conduct and statements.[50]

"Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy."[51]

The court noted that those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, should examine the major participants with a critical eye. This "invited comment" may include an examination of the participant's talents, education, experience, and motives to the extent that the publication is relevant to the public's decision whether to listen to him or her in regard to the controversy.[52]

In making its final determination, the Waldbaum court concluded that:

> In short, the court must ask whether a reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy and whether the alleged defamation related to that controversy."[53]

Whether the plaintiff is a public figure, the court pointed out, is a question of law for the court to resolve.[54]

Another U.S. Court of Appeals, this time the Second Circuit, set forth in a 1984 case a similar four-step approach as "a frame to determine what constitutes a 'limited purpose public figure.'"[55] To establish that a libel defendant is a public figure, the Second Circuit said, a defendant must show the plaintiff has:

> (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2)voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.[56]

Defining a public controversy as "any topic upon which sizeable segments of society have different, strongly held views," the Second Circuit found the plaintiff, a controversial, outspoken authoress and screenwriter advocating equality for female or male nudity in films,and who became a willing participant in this controversy, to be a limited purpose public figure.[57]

How have the lower courts utilized the Waldbaum and other such guidelines in determining who is and who is not a public figure? Indeed , who and under what circumstances have professional libel plaintiffs--namely, lawyers, teachers, doctors, and clergy--been deemed to be public figures as defined by the Supreme Court in Gertz and thus subject to the New York Times actual malice standard?

III. PROFESSIONAL PERSON AS LIBEL PLAINTIFF: RECENT CASES

A. The Lawyer as Plaintiff

A review of the reported libel cases during the past decade reinforces an observation of the U.S. Supreme Court in Gertz that an attorney does not become a public figure merely because he represents a client who is of concern to the public.[58] Indeed, of the eleven cases under review involving lawyers as plaintiffs, only six were found to be public figures. Clearly for lawyers to become public figures they must, as the Gertz Court has pointed out, "thrust themselves to the forefront of particluar public controversies in order to influence the resolution of the issues involved."[59] How did the lawyers in the six cases under study meet the Gertz requirement?

The U. S. Court of Appeals, Fifth Circuit, found that a Texas lawyer, who was president of a Guatemalan soft drink bottling company, was a limited purpose public figure in his libel action against syndicated columnist Jack Anderson who had written that the plaintiff had organized an "unmercifully ruthless campaign of intimidation and terror" at the bottling plant. Restating the Waldbaum three-step approach, the court ruled that labor violence at the plant was a public controversy, that the plaintiff had a prominent role in the controversy, and that the alleged defamatory publication was germane to the plaintiff's role in the controversy.[60]

A Florida attorney was found to be a public figure in a libel action against the Fort Lauderdale News claiming that he had been libeled in a series of articles concerning a dispute between the attorney, who served as one of three trustees governing disbursement of an estate's $14.5 million gift to Nova University, and the governing board of the university. The court noted that "although it is clear that the community had an interest in the outcome of the dispute, it is difficult to identify the public controversy with precision."[61] The court, citing the second Waldbaum guideline, concluded, however, that the plaintiff played a central role in the controversy by initiating "a series of purposeful, considered actions, igniting a public controversy in which he continued to play a prominent role."[62]

Consideration for appointment as a United States attorney was the condition that resulted in the loss of a West Virginia attorney's status as a private person in his libel action against the Charleston

Gazette which was precipitated by an editorial and political cartoon critical of such an appointment. The court observed that "a stronger case can be made for closer public scrutiny of a person whose appointment to public office is imminent, than of a person who is a candidate for elective office."[63] While certain portions of the editorial were found to draw upon the plaintiff's conduct as a private attorney, the court said that "those comments were used to reflect upon his fitness for public office."[64]

An attorney who became actively involved in a public controversy concerning legal self-representation and activism by the general public was found to be a public figure in his libel action against Publishers Weekly which had published a critical review of a book, How to Fight City Hall, authored by the plaintiff. The court cited the three-step approach of Waldbaum in identifying the controversy at issue as both broad and specific and in determining that the plaintiff had actively tried to influence the outcome of the controversy about self-representation and legal activism by the public through a number of writings over the years.[65] As to the connection between the alleged defamatory book review and the plaintiff's role in the public controversy, the court concluded: "That link is plain here." Publication of the book, in other words, invited the criticism appearing in the magazine's review.[66]

A Philadelphia attorney's voluntary association with motorcycle gangs, in conjunction with intense media attention the association engendered, was found to be sufficient under the Waldbaum guideline to render him a public figure though the U.S. Court of Appeals, Third Circuit, found it to be a "close case."[67] The court, in reversing the District Court, pointed out that while the plaintiff's indictment in the drug trafficking conspiracy and the attendant publicity did not in itself create a public figure status, and neither did his representation of motorcycle gang members, but these linked to the plaintiff's so-called "non-representation connections," for example, going on occasional weekend trips with motorcycle gang members, pushed the plaintiff over the public figure "threshold."[68]

It is clear, however, that where no "non-representation connections" are found, attorneys representing clients who may be engaged in public controversy are not themselves automatically thrust into such controversy merely by providing professional services to their clients. A Wyoming attorney, for example, who represented a client in her litigation against Hustler Magazine and was subsquently attacked by the magazine that named him "Asshole of the Month," was held to be a private figure by the Wyoming

Supreme Court.[69] While a professional person may be a public figure for some purposes, the court said, "Free Speech cannot equate with the freedom to intimidate, destroy and defame an advocate seeking to represent a client.[70]

A New Mexico attorney who was well known as a member of the Democratic Party was found to be a private person for purposes of a libel action arising from a newspaper article, headlines, and photographs regarding organized crime. The Supreme Court of New Mexico said that it was clear that the attorney did not voluntarily inject himself into the controversy; rather, he was involuntarily drawn into what the court labeled "a private controversy" between the attorney and the newspaper.[71]

A Texas attorney who served as an elected county justice of the peace was found to be a private figure in his libel action against a newspaper that had falsely stated in a news story that the attorney had been convicted of felony theft. The Texas Court of Appeals reasoned that while the attorney may be a public official in his capacity as justice of the peace, the newspaper item did not expressly relate to the plaintiff's official conduct as a justice of the peace, nor was it concerned with the performance of his official duties.[72]

A Georgia attorney, who was indicted and tried on charges of conspiring to aid a client's evasion of federal income tax, was likewise found to be a private person in his libel action against a broadcaster who had falsely reported that he had been found guilty. The Georgia Court of Appeals, noting that the attorney's participation in the litigation was limited to his role as a defendant in a federal criminal prosecution, and observing that he had never availed himself of opportunities to present his case informally through the news media, and did not make use of whatever notoriety had been thrust upon him by that prosecution to influence any public issue, had not become a public figure.[73]

The Montana Supreme Court, in a 1991 case, ruled that a trial court had erred in holding, as a matter of law, that an attorney who served as a corporation's legal counsel was a public figure in his libel action against a newspaper for articles that stated the plaintiff had been sought on criminal charges. The court held that "the trier of fact must establish if and how [the attorney] was involved to the degree required to make him a public figure and not merely a private figure who was representing his client.[74]

Since "a genuine issue of material fact" was found to exist as to whether the plaintiff had become a public figure involved in a matter of public concern, the case was remanded for further proceedings consistent with that decision.

B. The Teacher as Plaintiff

In only five of the eleven libel cases under review in which the actions were brought by a teacher did the courts rule that the plaintiff was a public figure for the purpose of applying the New York Times doctrine. In four of these cases the plaintiff had the additional assignment as either an administrator or an athletic coach. At first glance this may appear surprising since public school teachers are, by definition, on the public payroll and are arguably public officials.[75] Attorneys, as in the cases discussed above, are generally not operating on public funds yet apparently are more likely to be deemed public figures than are teachers, despite the example of Gertz. Addressing this issue, one court reasoned that "attorneys have significantly more access than teachers to the media and a more realistic opportunity to answer false charges about their competence."[76] School administrators and coaches, on the other hand, are often more in the public limelight and become more generally known in the community than are teachers without such special assignments.

The Georgia Court of Appeals, for example, ruled that a dean at Savannah State College who was drawn into a public controversy concerning the proposed reorganization of the college administration was a public figure in his libel action brought against a newspaper. The court said:

> [W]e believe there to be a distinct difference between the duties and responsibilities normally associated with the position of dean at a state college and those associated with a teaching position at such institution. While both positions are funded by the public, the holder of the former is very often called upon to make public speeches, formulate and implement policy decisions, introduce guests and speakers at the college, and to interact with the citizenry of the surrounding community.[77]

The court also noted that a professor, unless he or she chooses otherwise, can generally "remain out of the public eye and concern himself or herself with matters not directly related to academia."[78] Even a former dean a Southern University in Louisiana was found to be "a public official, or at least a public figure" in an action for defamation arising out of his dismissal as dean, but the court merely cited Gertz in arriving at its decision.[79]

But not all administrative assignments expose teachers to such public scrutiny. A public school principal in Chicago, for example, was found to be a private figure in her libel action against the school janitor. The Illinois Appellate Court, expressing an unwillingness "to place the imprimatur of 'public official' on a school teacher," reasoned that "The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation."[80]

Turning from administration to athletics, the head coach at the University of San Francisco, who brought a libel action against Time, Inc., as the result of an allegedly defamatory article published in Sports Illustrated, was found to be limited purpose public figure. The U. S. District Court, Northern District of California, utilizing the definition of public controversy provided by the Waldbaum court, reasoned that the plaintiff had become a public figure by voluntarily accepting the position as coach, inevitably thrusting himself into the forefront of an already existing public conroversy regarding alleged recruiting violations at the university.[81] The court cited "a long line of cases" involving professional and collegiate athletes and coaches as being consistent with its conclusion that "a position itself may be so prominent that any occupant unaviodably enters the limelight and thus become generally known in the community--a general public figure.[82]

But general public concern about recruiting violations in college athletics is in itself not always sufficient to qualify a coach, even at a National Collegiate Athletic Association Division I university, as a public figure. The assistant basketball coach at the University of Pittsburgh, for example, who brought a libel action against the Lexington Herald-Leader as the result of allegedly false statements made by an outstanding Kentucky basketball prospect that the coach offered to share the benefits of the raise the coach anticipated if the player signed to play at Pittsburgh, was found not to be a public figure. The Kentucky Supreme Court, noting that at Pittsburgh there was no particluar or ongoing controversy with which to link the general recruitment issues, ruled that the public controversy requirement of the Gertz test had not been met.[83] The court concluded:

> If Gertz did not thrust himself into the vortex of controversy by assuming the representation of a controversial plaintiff in the narrowly drawn controversy surrounding the civil and criminal liability of police officers who shoot citizens, it is inconsistent to characterize an assistant basketball coach's recruiting activities at the University of Pittsburgh as the means by which he thrust himself into the public concern surrounding recruiting.[84]

The Ohio Supreme Court, likewise, in a case involving a high school wrestling coach recognized for his coaching achievements, ruled that since he did not occupy a position of persuasive power and influence in the community he was therefore not a public figure in a libel action brought against the News-Herald, a newspaper owned by the Lorain Journal Co.[85] In overturning the Ohio Court of Appeals decision that the coach was a public figure, the Ohio Supreme Court reasoned that such a determination would require the court to ignore the redefinition of public figure status as enunciated in Gertz and its progeny. While the coach did become involved in a controversy surrounding the events during and subsequent to one of his team's wrestling matches, the court noted that the coach's position in his community did not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies.[86]

The fifth case in which a teacher libel plaintiff was found to be subject ot the New York Times "actual malice" rule, decided by the Oklahoma Court of Appeals, does little to clarify the public figure doctrine. The plaintiff in the case was a well-known civil rights worker; she was also a public school teacher. As the result of two allegedly defamatory newspaper articles charging her with numerous criminal acts, she brought a libel action against the publisher, The Black Dispatch Publishing Co. The court said, without further comment, "it is conceded" that the plaintiff was a public official by virtue of her position as a public school teacher and that she also was a "public figure by virtue of her civil rights work, radio show, and books."[87] Most of the court's attention was directed toward the plaintiff as a public official.

In another troublesome case, the Virginia Supreme Court ruled that a public school teacher, who was the subject of a front page article in the Richmond Times-Dispatch in which parents and students accused her of incompetence, was not a public figure in her libel action against the newspaper.[88] The court noted that although the newspaper article purported to raise the general question of what redress parents of a public school student may have when faced with an allegedly incompetent teacher, the story named only one allegedly incompetent teacher and charged only specific instances of that teacher's incompetence. Such redress, the court said, was available to the parents through the school system. The court also pointed out that there had been no showing that the teacher, who was not an elected official, either influenced or even appeared to influence or control any public affairs or school policy.[89]

C. The Doctor as Plaintiff

The practice of medicine, like the practice of law are teaching, does not in itself make one a public figure subject to the New York Times "actual malice" standard. Physicians, however, like lawyers and unlike teachers, appear to have more opportunity to become involved in the resolution of controversial issues that may make them public figures in subsequent libel litigation arising from such controversy. Indeed, a review of thirteen reported libel cases brought by doctors during the past decade indicates that six plaintiffs were found to be public figures, four were found not to be public figures for the purpose of the cases at issue despite being involved in activities outside their practice of medicine, and three others were stipulated to be private figures without further comment.

A Missouri physician who had written extensively about health and nutrition issues and who had appeared on a nationally televised broadcast discussing health and nutrition was held to be a public figure in a libel action against the author of a book and a speaker who had made critical statements about the plaintiff's practice of medicine. But the court pointed out that such a status was only "for a limited range of issues involving health and nutrition fraud."[90] Likewise, an Australian obstetrician, an expert in the study of birth defects, was found to be a public figure for the limited purpose of commentary concerning use of the drug Bendectin. The U.S. Court of Appeals, D.C. Circuit, noted that the doctor had voluntarily injected himself into the public controversy concerning the safety of the drug by testifying before the Food and Drug Administration about the drug's perceived dangers and by serving as an expert witness in litigation challenging the drug's safety. Utilizing the Waldbaum guidelines, the court found the doctor's role in the Bendectin controversy as "a paradigm of the limited-purpose public figure concept."[91]

A practicing obstetrician in Alaska who voluntarily sought appointment to the Alaska State Medical Board and thereby placed herself in a position of public attention and comment was held to be a public figure in a libel action brought by the doctor against the author of an article published in the Right-to-Life Hotline Newsletter labeling the plaintiff as "an abortionist." The Alaska Supreme Court reasoned that the article was of public interest, that the obstetrician voluntarily sought appointment ot the board, that one of the functions of the board was to regulate abortion procedures in the state, and that the qualification of such a potential appointee was therefore subject to public attention and comment.[92]

The Supreme Court of Mississippi held that three emergency room physicians were "vortex public figures" for the purpose of their libel action resulting from a newspaper editorial critical of their emergency room operation.[93] The court, citing a 1957 Mississippi Supreme Court decision,[94] said that such a quasi-public figure is "one who though otherwise a private figure becomes active or involved in a matter of public concern." Indeed, the matter of legitimate public interest need not produce actual controversy. And departing from the Gertz definition, the court said:

> Any person who becomes involved, voluntarily or involuntarily, in any matter of legitimate public interest--and this certainly includes the method of administration of any program of services financed in whole or in substantial part by public monies--becomes in that context a vortex public figure who is subject to fair comment.[95]

An Iowa obstetrician who placed a black-bordered advertisement in a newspaper protesting the state medical board's sanctions against him and announcing that he was quitting medicine was found to be a public figure for the limited purpose of commentary concerning his license to practice medicine.[96] Likewise, a physician who served as medical director of a university nursing center where he became involved in an ongoing controversy involving the medical treatment of patients and complaints concerning such treatment was held to be a public figure. In addition to accepting a position risking negative as well as favorable publicity, the court noted that the director had voluntarily contacted the television station, both in writing and by telephone, to discuss the controversies concerning the subject matter of the broadcasts and that he had given an interview concerning the broadcasts.[97]

A number of cases under review, however, make it clear that a doctor as a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public atttention. A physician who was involved in a public controversy concerning the alleged medical mistreatment or misdiagnosis of a patient was held not to be a public figure in his libel action against CBS arising out of an allegedly defamatory broadcast in a segment of "60 Minutes." Utilizing the Lerman guidelines, the court ruled that despite the plaintiff's involvement in the treatment of the patient and despite his subsequent voluntary submission to an interview on "60 Minutes" that there was no evidence that plaintiff had assumed a postion of prominence in publicity surrounding the alleged medical mistreatment of the patient nor that he had invited "public attention to his view in an effort to influence others" prior to his interview on "60 Minutes".[98]

A staff psychologist at a Veterans Administration hospital was found to be a private figure in a libel action against the Gannett Co. as the result of an article appearing in *USA Today*. The court said that although the plaintiff was a controversial figure at the Veterans Administration because of his opposition to the Vietnam War and his lack of empathy for Vietnam veterans that such controversy was largely unknown outside the hospital prior to the *USA Today* article. The court also reasoned that the plaintiff, while his duties of evaluation, therapy and counseling "could effect the emotional well-being of his patients," these duties did not necessarily invite public scrutiny. Neither did the plaintiff have control or supervision over other employees or engage in any aspect of agency funding.[99]

The Georgia Supreme Court ruled that a physician who became involved in a controversy concerning whether specialists in otolaryngology should perform plastic surgery was not a public figure in his libel action against the authors of a medical journal article since the dispute was merely a private controversy within the medical profession. The court explained that the genesis for the disputed article was a long-simmering controversy between two groups of doctors, plastic surgeons represented by authors of the allegedly defamatory article and otolaryngolgists who perform plastic surgery on the head and neck represented by the plaintiff.[100] A physician who served as president of the YMCA Board of Directors, which became involved in a public controversy regarding termination of employees, was found to be a private figure by the Rhode Island Supreme Court in his libel action against the *Pawtucket Evening Times*. The newspaper had published an article concerning the plaintiff's role as physician and his implied inaction in response to the collapse of a man who had been excluded from a YMCA meeting chaired by the plaintiff. The court reasoned that the defamatory statements involved plaintiff's role as a physician, not his public life. And while the nature of the incident may have been "newsworthy," the court ruled this did not make the plaintiff a public figure.[101] In three other cases, one brought by a psychiatrist,[102] one by an optometrist,[103] and another by a chiropractor,[104] each plaintiff was either stipulated to be a private figure or found not to be a public figure without further comment by the court.

D. The Clergyman as Plaintiff

From our nation's founding, one educator has pointed out, it has been particularly dangerous to publish criticism of the clergy.[105] This perception on the part of the media may account in part for the relatively small number of libel cases brought by clergymen during the past decade--less than half the number brought by each of the three other learned professions. It may also be a reflection of the reluctance of the clergy to become involved in controversial matters, but for those who have brought libel actions there is no indication in the cases reviewed that the clergy receive any different treatment than other libel plaintiffs. The case of the Rev. Jerry Falwell's libel action against Hustler Magazine, discussed in the introduction,[106] is a case in point. Although the Fourth Circuit failed to elaborate on its holding that Falwell was "admittedly a public figure," it is generally assumed that he was and remains an all purpose public figure by aggressively nurturing the public spotlight to promote and disseminate his personal views to as wide an audience as possible.[107]

The same year that a U.S. District Court in Virginia found the Rev. Falwell to be a public figure, a federal District Court in New York held that a Roman Catholic priest who had injected himself into a public controversy surrounding the independence of Northern Ireland was a public figure for the purpose of comment on those activities. The court, utilizing the Waldbaum guidelines, noted that the Northern Ireland dispute was clearly a public controversy and that the plaintiff had appeared frequently on radio and television broadcasts and before large audiences throughout the United States to expose his views on that conflict. The court rejected plaintiff's argument that being from a Catholic community in Northern Ireland he had simply been drawn into the controversy, first in his homeland and later, upon his transfer to Baltimore, in the United States. The Court said that even if he had been involuntarily drawn into the controversy, which the facts belied, that the Gertz public figure category included those involuntarily "drawn into" a public controversy.[108]

The pastor of the Center for Hope Church in Westminster, Colo., however, was found to be a private figure in his libel action against a denominational magazine that published an article alleging financial difficulties of the church and two other corporations affiliated with the church. The "undisputed facts" that indicated that the plaintiff was not a public figure were not disclosed in the opinion.[109]

A minister who served as the president of a tax-exempt organization that sponsored counseling service for naval personnel was found to be a private figure in his libel action against the publisher of the News-Sun, a Lake County, Ilinois, newspaper. The newspaper had reported that plaintiff lured members of his religious organization into homosexual encounters, promoted illegal absences from the U.S. Navy, and encouraged large personal contributions. In answering defendant's argument that the plaintiff had injected himself into local controversies by making speeches, appearing on radio and television, and becoming involved in local politics the court said there was no public controversy prior to publication of the News-Sun articles.[110]

Even a church may become so involved in controversy as to be considered a public figure subject to the New York Times doctrine should it pursue a libel action. The Church of Scientology, for example, was found to be a public figure in a libel action against the mayor of Clearwater, Fla., for statements the mayor made to the press concerning the church's controversial purchase of a downtown hotel in view of the public events and widespread publicity surrounding the purchase, occupation and use of the hotel.[111]

IV. CONCLUSIONS

One legal scholar, writing in 1983, noted that "the constitutional term 'public figures' is, after Gertz and its progency, much narrower than might be supposed."[112] This study of 39 cases involving professional libel plaintiffs, all reported during the past decade, indicates that the courts generally have continued to define public figures narrowly. Of the eleven cases examined involving lawyers as plaintiffs, for example, only six were found to be public figures. Of eleven cases involving teachers, only five were public figures. Of thirteen cases involving doctors, only seven were public figures, and of the four cases involving the clergy as plaintiffs, only two were found to be public figures.

As might be expected, in the majority of the 39 cases studied, Gertz was cited and utilized in one way or another, but 18 years after the redefinition of what constitutes a public figure in Gertz it is also apparent that state courts and lower federal courts are applying that definition in seemingly inconsistent ways with differing results. A doctor who injected himself into a public controversy concerning the safety of the drug Benedictin by testifying before the Food and Drug Administration about the drug's perceived dangers and by serving as an expert witness in litigation challenging the drug's safety, for example, was found to be "a paradigm of the limited-purpose public figure concept," but a doctor who became involved in a public contoversy concerning the alleged medical mistreatment or misdiagnosis of a patient and who voluntarily submitted to an interview on the CBS program "60 Minutes" was deemed to be a public figure in his libel action against CBS.

Clearly there needs to be a more focused approach on the process of determining who is and who is not a public figure. The U.S. Court of Appeals, D.C. Circuit, provided such a process approach in Waldbaum. First, the court said, the public controversy should be isolated; secondly, the plaintiff's role in it should be analyzed; and thirdly, it must be determined that the alleged defamation was germane to the plaintiff's participation in the controversy. It is interesting that in the sevcen cases under study in which the court utilized the Waldbaum guidelines that each of the professional plaintiffs was found to be a public figure. However, most courts, to some degree, examined the role the plaintiff was seeking to play in determining the outcome of the alleged controversy and whether or not the alleged defamation related to that controvesy--but often with confusing results.

One court ruled, for example, that the alleged controversy simply did not exist until after the defamatory publication. Another court found the controversy to be private, not public and a state supreme court, ignoring Gertz, ruled that a matter of legitimate public interest need not produce actual controversy in determining that three emergency room doctors were public figures in their libel action resulting from a newspaper editorial.

In 1984, the U.S. Court of Appeals, Second Circuit, in the Lerman case established a four-step approach as guidelines for determining what constitutes a limited purpose-public figure, but just as with Waldbaum, the Lerman decision has only occasionally been cited and its guidelines applied in cases involving the public figure status of professionals. In fact, in some cases, courts simply are silent on how they arrived at the public figure/private person status of the libel plaintiff. The Waldbaum decision, however, remains important because its approach to determing what constitutes a public figure places emphasis upon isolating the public controversy and an analysis of the plaintiff's role in the controversy.

In determining the role of the professional libel plaintiff, it is clear from the review of cases that it takes more than a lawyer representing a client or a doctor treating a patient for one to become a limited-purpose public figure. They must, according to Gertz, "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." The degree of thrust required, however, is often difficult to determine. Imminent appointment of a private attorney to public office was thrust enough in West Virginia. Voluntary association and other "non-representation connections" of an attorney with motorcycle gangs was enough in Philadelphia. A black-bordered advertisement in a newspaper protesting the state medical board's sanctions against him provided the threshold for an Iowa obstetrician. But an attorney's indictment and prosecution on charges of conspiring to aid a client's evasion of federal income tax was not enough to constitute a public figure role in Georgia despite the notoriety which had been thrust on him by his participation in the litigation.

In the case of teacher, the Gertz concept of prominence seems to be particularly important. In one case, a dean and in another a former dean were found to be public figures. In another case, a superintendent of schools was found to be a public official but a high shcool principal was not. A head basketball coach at the Unviersity of San Francisco was a public official but an assistant basketball coach at the University of Pittsburgh was not. A wrestling coach at an Ohio high school was found not to be a public figure, but his school superintendent was deemed to be a public figure. In yet another case, the Oklahoma Supreme Court said that a teacher was not a public figure in her role as an educator but was a public figure in her involvement as a civil rights worker.

What is badly needed is a U.S. Supreme Court decision that provides a better focus in determining what constitutes a limited-purpose public figure. As one commentator has written: "[T]he public figure/private figure question is one of constitutional importance, and does not seem fit for decision according to local option."[113] Clear guidelines in determining who is and is not a public figure are not only important for the press, else editors may choose to err on the side of suppression when trying to predict how a court may analyze a news story's First Amendment status, but for members of the general public as well. The D.C. Circuit in *Waldbaum* noted: "Our society always has encouraged citizen involvement in public affairs. The fear of no redress for injury to reputation may deter an individual from engaging in some course of conduct that a court later might find to have altered his status."[114] If the *Gertz* redefinition of public figure 18 years ago narrowed the scope of such a status classification for libel plaintiffs, a set of Court-sanctioned guidelines similar to those set out in *Waldbaum* would go a long way in clarifying how such a status will be determined by future courts.

REFERENCE NOTES

1. See, e.g., Frederick Schauer, "Public Figures," William & Mary Law Review 25 (Special Issue 1983-84); 906. See also, Media Law Reporter, Index Digest, Sec. 11.20, "Determining public official/public figure."

2. New York Times Co. v. Sullivan, 376 U.S. 2454, 280, (1964). The actual malice standard was extended from public officials to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). See also, Restatement (Second) Torts, Sec. 580A (1977).

3. Gertz v. Robert Welch, Inc., 418 U.S. 264, 347 (1974). See also, Restatement, Sec. 580B.

4. For a discussion of the application of the negligence standard by the state courts and problems with the definition of such standards, see W. Wat Hopkins, "Negligence 10 Years After Gertz v. Welch, Journalism Monographs 93 (August 1985).

5. Some 39 cases have been identified since 1982 involving such professional plaintiffs. The cases are discussed in Section III.

6. Paul F. Parsons, "Dangers of Libeling the Clergy," Journalism Quarterly 62 (Autumn 1985): 528-32, 539.

7. Lyle Denniston, "Libeling Teachers:" It's Chaos," Washington Journalism Review 10 (July-August 1988): 47.

8. Restatement, Sec. 573, Comment c.

9. The Restatement comment continues: Statements that a physician is a drunkard or a quack, or that he is incompetent or negligent in the practice of his profession, are actionable. So too, a charge that a physician is dishonest in his fees is actionable, althought an imputation of dishonesty in other respects does not affect his character or reputation as a physician. Ibid., comment c.

10. Robert D. Sack, Libel, Slander, and Related Problems (New York: Practising Law Institute, 1980), p. 204.

11. A trainer of thoroughbred horses, for example, was treated as a public figure by a New York court in Lloyds v. United Press International, 311 N.Y.S.2d 373 (N.Y. Co. S.Ct. 1970), while a well-known trainer of Appaloosa horses was held to be a private person by an Oregon court in Wheeler V. Green, 593 P.2d 777 (Ore. 1979). Sack concluded: "Perhaps the result can be justified on the ground that thoroughbreds are employed in the public sport of horseracing; Appaloosas usually are not." Ibid. at 204 n.122.

12. Georgia Society of Plastic Surgeons v. Anderson, 14 Med. L. Rptr. 2065 (Ga. 1987).

13. McBride v. Merrell Dow Pharmaceuticals, 13 Med. L. Rptr. 1386 (D.C. Cir. 1986).

14. 418 U.S. 264.

15. 376 U.S. at 280. See also, Note, "The 'Fleshing Out' of the Gertz Public Figure Standards--Waldbaum v. Fairchild Publications, Inc.," Toledo Law Review 12 (Summer 1981): 1029.

16. 388 U.S. 130 (1967).

17. Ibid. at 155. For a discussion of the disagreement among the Justices concerning the degree of protection that a public figure should receive, see Harry Kalven, Jr., "The Reasonable Man and the First Amendment: Hill, Butts, and Walker," Supreme Court Review (University of Chicago, 1967): 267, 275.

18. 403 U.S. 29, 44 (1971).

19. See, e.g., David W. Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.," Texas Law Review 54 (January 1976): 206.

20. 418 U.S. 324.

21. Ibid at 345, 351.

22. Ibid. at 343.

23. Ibid. at 345.

24. Sack, Libel, Slander, and Related Problems, p. 197.

25. Schauer, "Public Figures," p. 908.

26. 418 U.S. at 345.

27. Ibid. at 345.

28. Ibid. at 351-52.

29. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

30. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

31. Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

32. 424 U.S. at 454-55. This and comments on Hutchinson and Wolston set out below were suggested by the Second Circuit in Lerman v. Flynt Distributing Co., 745 F. 2d 123, 136 (2d Cir., 1984). See also, text accompanying notes 55-57, infra.

33. 443 U.S. at 135-36.

34. 442 U.S. at 166.

35. Gerald G. Ashdown, "Of Public Figures and Public Interest--The Libel Law Conundrum, William & Mary Law Review 25 (Special Issue 1983-84): 940-41.

36. 485 U.S. 46 (1988).

37. Ibid. at 878. The Fourth Circuit, without discussion, had held that Falwelll was "admittedly a public figure." Falwell v. Flynt, 797 F.2d 1270, 1273 (4th Cir. 1986).

38. Falwell v. Penthouse International, Ltd., 521 F. Supp. 1204, 1210 (W.D. Va. 1980).

39. For a more extensive judicial review of the public figure vs. private figure question, see Warford, vs. Lexington Herald-Leader, 17 Med. L. Rptr. 1785, 1787-92 (Ky. 1990).

40. Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

41. Rosanova v. Playboy Enterprises , Inc., 580 F.2d 859, 861 (5th Cir. 1978), citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

42. Sack, Libel, Slander, and Related Problems, p. 198.

43. Steere v. Cupp, 602 P.2d 1267, 1273 (Kan. 1979).

44. 627 F.2d 1287 (D.C. Cir. 1980).

45. 627 F.2d at 1293.

46. Ibid. at 1297, citing Gertz v. Robert Welch, Inc., 418 U.S. at 352.

47. Ibid. at 1296.

48. Ibid. at 1296.

49. Ibid. at 1297.

50. Ibid. at 1297.

51. Ibid. at 1298.

52. Ibid. at 1298.

53. Ibid. at 1298.

54. Ibid. at 1293 n.12, citing Wolston v. Reader's Digest Ass'n, 578 F.2d at 429.

55. Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2d Cir. 1984).

56. Ibid. at 136-37.

57. Ibid. at 138.

58. 418 U.S. at 323.

59. Ibid. at 345.

60. Trotter v. Anderson, 14 Med. L. Rptr. 1180, 1182-84 (5th Cir. 1987).

61. Della-Donna v. Gore Newspapers, 12 Med. L. Rptr. 2310, 2313 (Fla. App. 1986).

62. Ibid. at 2314.

63. Miller v. Charleston Gazette, 9 Med. L. Rptr. 2540, 2543 (W. Va. Cir. Ct. 1983).

64. Ibid. at 2543.

65. Joseph v. Xerox Corp., 11 Med. L. Rptr. 1085, 1088 (D.C.C. 1984).

66. Ibid. at 1089. For another attorney who wrote books, see Lane v. New York Times, 8 Med. L. Rptr. 1623 (D.C. Tenn. 1982) (Mark Lane, who published books on subjects of broad public interest and was former business manger of the Jonestown People's Temple religious cult, found to be a public figure in libel action against newspaper which charged that plaintiff had traveled to Switzerland to remove funds from cult's Swiss bank account.

67. Marcone v. Penthouse, 754 F.2d 1072, 1086 (3rd Cir. 1985).

68. Ibid. at 1086-87.

69. Spence v. Flynt, 19 Med. L. Rptr. 1129 (Wyo. 1991).

70. Ibid. at 1133. For further analysis of Spence v. Flynt, see Lyle Denniston, "A 'Cowboy' Lawyer Hogties The Press," Washington Journalism Review, May 1992, p. 42. What the Supreme Court said in regard to the question of public figure versus private figure was this: "Hustler's argument is structured upon the proposition that Spence has taken up the fight against pornography, thrust himself into the controversy as a public figure, and is therefore subject to response by persons taking the other side. Spence may or may not, in fact, be personally opposed to pornography. That fact is not disclosed by teh record in this case. What is disclosed by the record is that, under the circumstances pressented here, he appears only to be representing a client who is fighting pornography and is on her side only in the sense that he is providing professional services to her." And later the court said: "It seems reasonable also that Spence might be a public figure in some situations and a private person in others. While it is admitted by all that Spence was not a "public figure" for his role as a lawyer representing Dworkin which led to the allegedly defamatory publication."

71. Marchiondo v. Brown, 649 P.2d 462, 467-68 (N.M. 1982).

72. Guinn v. Texas Newspapers, 16 Med. L. Rptr. 1024, 1025 (Tex. App. 1987).

73. Western Broadcasting v. Wright, 14 Med. L. Rptr. 1286, 1287 (Ga. App. 1987).

74. Kurth v. Great Falls Tribune Co., 18 Med. L. Rptr. 1971, 1974 (Mont. 1991).

75. For a discussion of the issue of teachers as public officials for the purpose of the New York Times doctrine, see Note, "Defamation of Teachers: Behind the Times?" Fordham Law Review 56 (May 1988): 1191-1207.

76. Richmond Newspapers v. Lipscomb, 14 Med. L. Rptr. 1953, 1955 (Va. 1987).

77. Byers v. Southeastern Newspapers, 9 Med. L. Rptr. 1597, 1999 (Ga. App. 1982).

78. Ibid. at 1599.

79. Hicks v. Stone, 425 So.2d 807, 813 (La. App. 1982). See also, Scott v. News-Herald, 13 Med. L. Rptr. 1241 (Ohio 1986) (The superintendent of a municipal public school system was held to be a public official in a libel action against a newspaper precipitated by a story critical of the high school wrestling coach and the superintendent.).

80. McCutheon v. Moran, 425 N.E. 2d 1130, 1133 (Ill. App. 1981). See also, Foote v. Sarafyan, 432 So.2d 877, 880 (La. App. 1982) (A department chairman at a state university in Louisiana and two

So.2d 877, 880 (La. App. 1982) (A department chairman at a state university in Louisiana and two mathematics professors were found to be a private figures in a libel action against another professor who made defamatory statements about them published in the university newspaper.).

81. Barry v. Time, Inc., 10 Med. L. Rptr. 1809, 1915 (N.D. Cal. 1984).

82. Ibid. at 1815.

83. Warford v. Lexington Herald-Leader, 17 Med. L. Rptr. 1785, 1793 (Ky. 1990).

84. Ibid. at 1795.

85. Milkovich v. News-Herald, 11 Med. L. Rptr. 1598 (Ohio 1984), rev'd, 110 S.Ct. 2695 (1990).

86. Ibid. at 1601. See also, Tamirez v. Rogers, 15 Med. L. Rptr. 1364 (Me. 1988) (Head of a gymnastics school in Bangor, Maine, held to be a private figure in libel action taken against a competitor.

87. Luper v. The Black Dispatch Publishing Co., 675 P.2d 1028, 1031 (Okla. 1983).

88. Richmond Newspapers v. Lipscomb, 14 Med. L. Rptr.. 1953 (Va. 1987), cert. denied, 108 S.Ct. 1997 (1988). One reporter covering the Court said that not a single justice was recorded as voting to hear the Richmond appeal, indicating the Court was "uninterested in straightening out the conflict." Denniston, "Libeling Teachers: It's Chaos," p. 47.

89. Ibid. at 1956. See also, Madsen v. Buie, 454 So.2d 727 (Fla. App. 1984) (A professor of psychology at Florida State University held not to qualify as a public figure in his libel action against the writer of a letter to the editor published in the Tallahassee Democrat newspaper criticizing behavior modification techniques advocated by plaintiff in parenting classes.

90. Renner v. Donsbach, 18 Med. L. Rptr. 1930, 1934 (W.D. Mo. 1990).

91. McBride v. Merrell Dow Pharmaceuticals, 13 Med. L. Rptr. 1387, 1389 (D.C. Cir. 1986).

92. Moffatt v. Brown, 15 Med. L. Rptr. 1601, 1603 (Alaska 1988).

93. Ferguson v. Watkins, 448 So.2d 271,277 (Miss. 1984).

94. Edmonds v. Delta Democrat Publishing Co., 93 So. 2d 171 (Miss. 1957).

95. Ferguson v. Watkins, 448 So.2d at 278.

96. Ayers v. Des Moines Register, 9 Med. L. Rptr. 1401, 1402 (Iowa D.C. 1983).

97. Ward v. Roy H. Park Broadcasting, 18 Med. L. Rptr. 2311, 2317 (N.C. App. 1991).

98. Pesta v. CBS, 15 Med. L. Rptr. 1798, 1800-01 (E.D. Mich 1988).

99. Kassel v. Gannett Co., 15 Med. L. Rptr. 1702, 1704-05 (D.C. N.Y. 1988).

100. Georgia Society of Plastic Surgeons v. Anderson, 14 Med. L. Rptr. 2065, 2067 (Ga. 1987).

101. Healey v. New England Newspapers, 16 Med. L. Rptr. 1753, 1757 (R.I. 1989).

102. Weiner v. Doubleday & Co., 15 Med. L. Rptr. 2441 (N.Y. App. 1988).

103. Gaynes v. Allen, 339 N.W.2d 678 (Mich. App. 1983).

104. Dougherty v. The Boyertown Times, 15 Med. L. Rptr. 2433 (Pa. 1988).

105. Parsons, "Dangers of Libeling the Clergy," p. 539.

106. See text accompanying notes 36-38, supra.

107. Falwell v. Penthouse International, Ltd., 521 F. Supp. at 1210.

108. McManus v. Doubleday, 7 Med. L. Rptr. 1475, 1479 (S.D. N.Y. 1981).

109. Haan v. Board of Publications, 10 Med. L. Rptr. 1671, 1672 (Colo. D.C. 1984).

110. Davis v. Keystone Printing Service, 14 Med. L. Rptr. 1225, 1227 (Ill. App. 1987).

111. Church of Scientology v. Cazares, 4 Med. L. Rptr. 1651 (D.C. Fla. 1978). See also, Church of Scientology v. Siegelman, 5 Med. L. Rptr. 2021 (D.C. N.Y. 1979).

112. Ashdown, "Of Public Figures and Public Interest," p. 940.

113. Denniston, "Libeling Teachers," p. 47.

114. 628 F.2d at 1293.

The Anti-Federalists and Taxation under the Free Press Clause of the First Amendment

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I. Introduction

> Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? . . . What signifies that 'the liberty of the press shall be inviolably preserved'? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.[1]

Thus, in The Federalist, No. 84, Alexander Hamilton responds to objections that the proposed constitution for the United States does not include protections for the press. He repudiates the need for a bill of rights generally and protections for freedom of the press specifically, saying such freedom cannot be defined. Indeed, during the Constitutional Convention itself, George Mason proposed that a committee prepare a bill of rights to be included in the proposed constitution, but this effort was unanimously rejected by the state delegations. Later, Charles Pinckney and Elbridge Gerry sought a declaration of freedom of the press but were rebuffed.[2] This set the stage for opposition to ratification of the proposed constitution.

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[1] The Federalist No. 84, at 252-53 (Alexander Hamilton) (Robert Maynard Hutchins ed., 1952) (footnote omitted).

[2] Robert Allen Rutland, The Birth of the Bill of Rights, 1776-1791, at 116-17 (1991).

This paper will attempt to define a particular aspect of the press clause of the First Amendment of the Bill of Rights.[3] That aspect involves taxation of newspapers and original intent and focuses on the arguments put forth by those opposed to ratification, known as the Anti-Federalists. The questions at issue are: Did the Anti-Federalists articulate a position on freedom of the press and, if so, what was it? And, has the Supreme Court recognized this position?

Opposition to Hamilton and the Federalist position on a bill of rights, although not unified, was strong enough that Federalists compromised and agreed to a bill of rights to gain adoption of the Constitution.[4] The opponents to ratification formed a loose coalition, known as the Anti-Federalists. Among the themes given voice by the Anti-Federalists were that the Constitution lacked of a bill of rights, that it created an aristocracy, that the federal government was too consolidated and therefore too powerful, and that the constitutional convention had exceeded its authority.[5] Whether the opposition was genuine in its call for a bill of rights or whether that was simply a way to gather support, as Leonard W. Levy[6] and others have suggested, is not germane to this analysis because the fact remains, whatever the Anti-Federalists' motives, it was "the single issue that united Anti-Federalists throughout the country,"[7] and it was through their efforts that a compromise was reached that allowed adoption of the proposed constitution with a promise that a bill of rights would be appended.

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[3] U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[4] Robert Allen Rutland, The First Great Newspaper Debate: The Constitutional Crisis of 1787-88, 50 (1987).

[5] Daniel Farber and Suzanna Sherry, A History of the American Constitution 178 (1990).

What role should the views of the Anti-Federalists have when we consider questions related to the Bill of Rights and the Framers' intentions? Bernard Schwartz, for one, sees the Anti-Federalist pronouncements as critical.

> Historically, there is nothing as irrelevant as a lost constitutional cause, particularly one lost centuries ago. . . . The same should not, however, be true of the controversy over the absence of a bill of rights. Here the Anti-Federalists had the stronger case . . . [and] it is the Anti-Federalist writings that are the more interesting and even the more influential.[8]

Saul Cornell is even stronger in endorsing of this view:

> It is important to recall that the ratification of the Constitution was only secured because Federalists agreed to consider subsequent amendments recommended by Anti-Federalists in various state conventions. . . . Since nearly all defenses of originalism rely on a political justification that is implicitly majoritarian, the means by which consent was secured and ratification achieved is of central importance. For those who wish to make an argument about original intent, it is impossible to ignore the bargain that was struck to pave the way for adoption: ratification rested on an implicit contract . . . Anti-Federalist

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[6] Leonard W. Levy, Emergence of a Free Press 221 (1985).

[7] Id. at 233.

[8] Bernard Schwartz, The Great Rights of Mankind: A History of the American Bill of Rights, 111-12 (1991).

> political thought is essential to understanding the meaning of the Bill of Rights.[9]

Because the logic of these views on original intent and the Bill of Rights is inescapable, this analysis will deal primarily with the Anti-Federalists.

What occurred during the ratification debate was a classic political tussle that ended with James Madison, father of the Constitution and co-author with Hamilton and John Jay of The Federalist, accepting the Anti-Federalist position on the need for a bill of rights.[10]

The Federalist was printed first in the weekly New York Independent Journal newspaper and then reprinted in other newspapers in the 13 states.[11] Compiled in book form even before adoption of the Constitution, The Federalist gained widespread stature and recognition as the key authority on the intentions of the framers of the Constitution. No similar compilation of Anti-Federalist writings has commanded such authority.[12] Indeed, a search of LEXIS, Genfed library, US file (November 1991) of all Supreme Court opinions shows that Anti-Federalist writings, in contrast to The Federalist and other Federalist documents, were largely ignored in American jurisprudence for 150 years. It was not until 1927[13] that the word "Anti-Federalist"[14] appears in a Supreme Court decision, and since it first appeared, specific reference to "Anti-Federalist" has occurred in only 10 other Supreme Court decisions.[15] Only two of those cases involved First Amendment issues,[16] and only the 1983 Minneapolis Star[17] case was related to the free press-clause. Other phrases, such as "opponent(s) of the Constitution" and "framer(s) of the First Amendment" occur more frequently (excluding those cases in which "Anti-Federalist" also appears). But of those cases including the former phrase, only two even tangentially mention the First

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[9] Saul Cornell, The Changing Historical Fortunes of the Anti-Federalists, 84 Nw. U. L. Rev. 39, 66-67 & n.107 (1989). This article is part of a symposium edition of the law review devoted to the Anti-Federalists titled "Roads Not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory."

[10] Lucas A. Powe, Jr., The Fourth Estate and the Constitution 44-45 (1991).

[11] Edwin Emery, The Press and America 101 (3d ed. 1972).

[12] 1 The Complete Anti-Federalist 5 (Herbert J. Storing ed., 1981) [hereinafter Storing].

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[13] Leach & Co. v. Peirson, 275 U.S. 120 (1927).

[14] It seems appropriate here to note that the name given to opponents of the Constitution has assumed a variety of styles. For the sake of consistency and in agreement with 1 Storing, supra note 12, at n.6 at 79, the style "Anti-Federalist" will be used (except in quoted matter or titles) as best balancing the negative aspects and the cohesion of the cause.

[15] U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990); Welch v. Texas Dept. of Highways et al., 483 U.S. 468 (1987); Atascadero State Hospital et al. v. Scanlon, 473 U.S. 234 (1985); Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983); Parklane Hosiery Co. et al. v. Shore, 439 U.S. 322 (1979); U.S. Trust Co. of N.Y., trustee v. New Jersey et al., 431 U.S. 1 (1977); Elrod v. Burns et al., 427 U.S. 347 (1976); Powell v. McCormack et al., 395 U.S. 486 (1969); Carter v. Carter Coal Co. et al., 298 U.S. 238 (1938).

[16] Minneapolis Star, 460 U.S. passim; Elrod, 427 U.S. at 378 (Rehnquist, J., dissenting).

[17] Minneapolis Star, 460 U.S. 575.

Amendment.[18] The latter phrase is found in 27 cases, beginning in 1936.[19] However, "Anti-Federalist" and "framer of the First Amendment" are not synonymous -- and Madison, first a co-author of The Federalist and architect of the Constitution and then author of the Anti-Federalist-inspired Bill of Rights in a Federalist-dominated Congress, is the best example that they are not. Even so, citation to either term is a relatively recent phenomenon in the 200-year history of the Constitution. And because the focus in this paper is on the Anti-Federalists, the implications behind other terms will not be explored here.[20]

Because they were a coalition, the Anti-Federalists perhaps failed to present a coherent argument against the Constitution, but they nonetheless won the battle for a bill of rights. (As with any coalition, unity for the attainment of political goals is more important than unity on ideology. Thus, one might expect Anti-Federalist writings sometimes to be at odds with one another.) This, however, was one case in which winners **do not** write history, for often jurists look to The Federalist to determine the intent of the framers.

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[18] Jett v. Dallas Independent School District, 491 U.S. 701 (1989) (a municipality may not be held responsible for employees' violation of [42 U.S.C.] § 1981 under responsible superior theory); Nevada et al. v. Hall et al., 440 U.S. 410 (1979) (a state is not constitutionally immune from suit in the courts of another state).

[19] Grosjean v. American Press Co., 297 U.S. 233 (1936).

[20] Among the problems with considering "opponents of the Constitution" is that it is a general term lacking the partisan nature and authority inherent in "Anti-Federalist." More obviously, to be an "opponent of the Constitution" was not necessarily to be a supporter of a bill of rights, which was a central theme of the Anti-Federalist cause. As for "framers of the First Amendment," the actual drafting of the Bill of Rights took place several years after the constitutional debate and compromise between the Federalists and Anti-Federalists that spawned it. With the exception of Madison, "framers of the First Amendment" (if that is taken to mean the members of Congress most active in the debate over the wording of the Bill of Rights) are not the same individuals as the framers of the Constitution. Neither can it be said that Federalists opposing a bill of rights were opposed to press freedom; to do so openly would have been political suicide. In fact, Federalists frequently pointed to state constitutional protections of the press, which they seemed to support.

It is the thesis of this paper that the Anti-Federalists had a clear, well articulated understanding of at least one aspect of freedom of press: The federal government had no power to tax newspapers. This Anti-Federalist proposition has been recognized, albeit in modified form, by the Supreme Court.

In contrast to this position, other scholars have said, for example, "The first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended."[21] This paper will examine the Anti-Federalist role with regard to the press clause of the First Amendment and specifically implications for the power to tax newspapers.[22] Other opportunities for research in this area also will be outlined.[23]

II. Historiography of Anti-Federalism

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[21] Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. Jour. 1, 22.

[22] Infra §§ II, III, IV.

[23] Infra § V.

The role of the Anti-Federalists, particularly with regard to freedom of the press, has been slow to emerge in significant court cases, as already has been noted. It seems likely that this is at least partly because there was a dearth of sophisticated scholarship in the area, at least until this century. Beginning in 1913 with Charles A. Beard's An Economic Interpretation of the Constitution, studies of the early nation-building period began to lay out the role played by the Anti-Federalists. Beard's Progressive approach emphasized class conflicts and economic differences between the urban-mercantile-creditor Federalists and the rural-agrarian-debtor Anti-Federalists. Earlier historians had recognized the dichotomy but had not been rigorous in their examination of the Anti-Federalist position because of an antipathy toward it.[24] In the post-World War II era, a "consensus history" was developed that proclaimed that "the factors that united the Federalists and the Anti-Federalists were stronger than those that divided them."[25] Current scholarship attempts to meld the two approaches.[26]

But until recently, references to the Anti-Federalists' concept of freedom of the press were rare. In 1961, Jackson Turner Main's The Antifederalists: Critics of the Constitution had but three indexed references to freedom of the press.[27] Two of the references linked press freedom with the power of the federal government to tax, although Main states that the absence of a press clause "was ordinarily noted in general terms."[28] In 1966, Cecelia M. Kenyon compiled the first edition of The Antifederalists, regarded as the "best single-volume collection of Antifederalist opinion."[29] In his foreword, Gordon S. Wood sums up Kenyon as saying the Anti-Federalists' advocacy of a bill of rights "was the one opposition argument that was right on target."[30] Yet, with regard to freedom of the press, Kenyon has only 13 index entries. Main was simply echoing one of Hamilton's criticisms[31] when he noted that most references by Anti-Federalists to press freedom are brief "general declarations" -- often nothing more than a call for "freedom of the press." Perhaps this indicates such widespread understanding of the meaning of the phrase that no elaboration was necessary, and this seems to be Levy's opinion as well.[32] But a Massachusetts Anti-Federalist writing on November 5, 1787, under the pseudonym John De Witt provides some insight into what was then understood by the phrase "freedom of the press":

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[24] James H. Hutson, Country, Court and Constitution: Antifederalism and the Historians 38 Wm. & Mary Q. 337 passim (1981).

[25] The Anti-Federalists at xxviii (Cecelia M. Kenyon ed., rev. ed. 1985) (1961) [hereinafter Kenyon].

[26] Hutson, supra note 24, at 356.

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[27] Jackson Turner Main, The Antifederalists 125, 154, 160-61 (Quadrangle Paperback ed., 1964) (1961).

[28] Id. at 160.

[29] Gordon S. Wood, Foreword to Kenyon, supra note 25, at vii.

[30] Id. at vii.

[31] See infra text accompanying note 62.

[32] Leonard W. Levy, Original Intent and the Framers' Constitution 195 (1988).

> Civil liberty in all countries, hath been promoted by a free discussion of publick measures, and the conduct of publick men, The Freedom Of The Press hath, in consequence thereof, been esteemed one of its safe guards. That freedom gives the right, at all times, to every citizen to lay his sentiments, in a decent manner, before the people. If he will take that trouble upon himself, whether they are in point or not, his countrymen are obliged to him for so doing; for, at least, they lead to an examination of the subject upon which he writes.[33]

De Witt's comments are specific. He cites public figures, public issues, "decent" expression[34] and an obligation to listen to alternate views. These areas, seen in the modern context of libel and access,[35] are serious First Amendment issues.

For many scholars, the difficulty of ascertaining Anti-Federalist views on particular issues was eased with the 1981 publication of Herbert J. Storing's comprehensive, seven-volume collection of their writings, The Complete Anti-Federalist.[36] Numerous references to freedom of the press are found in this compilation of articles from period newspapers, handbills, and other writings, probably providing the most comprehensive source to aid in determining the original intent of the Anti-Federalists. Levy relies heavily on this documentation in two chapters of his 1985 Emergence of a Free Press, and he concludes that the framers themselves had no unified understanding of the meaning of the First Amendment. Indeed, Levy, as he acknowledges, is not the first constitutional scholar to come to this conclusion. In 1949, Zechariah Chafee wrote: "The truth is, I think, that the Framers had no very clear ideas as to what they meant by 'the freedom of speech[,] or of the press.'"[37] But, Levy goes further:

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[33] Kenyon, supra note 25, at 102.

[34] Levy, supra note 6, at 248, declares "'in a decent manner' indicated acceptance of the common law on criminal libels." However, 4 Storing, supra note 12, at n.3, at 215 and accompanying text, says the legal consequences for "publish[ing] indecent pieces" "meant a prohibition against prior restraint" and cites John Bach McMaster and Frederick D. Stone eds., Pennsylvania and the Federal Constitution, 1787-1788 at 308 (1888).

[35] See, e.g., Jerome Barron, Access to the Press -- A New First Amendment Right, 80 Harv. L. Rev. 1641 (1969). Barron's arguments for access to newspapers were grounded in the principles of the First Amendment, but Anti-Federalist comments such as De Witt's would have added a historical element that was otherwise missing. "Even the most ardent advocates of access legislation have never sought to claim a historical respectibility (sic) for their proposals; theirs is the argument of changed circumstance." Lee C. Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1, 3 (1976).

> If, however, a choice must be made between two propositions, first, that the clause substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the evidence points strongly in favor of the former proposition.[38]

It is this view by Levy of an illiberal free press tradition that has engendered controversy.

A number of scholars have found reasons to doubt Levy's thesis. William W. Van Alstyne claims Emergence is a "thesis set against itself."[39] As he sees it, the Anti-Federalist push for protection of the press was driven by a fear of congressional power rather than by libertarian ideals; state governments would be the sole determiners of the extent of freedom of the press.[40]

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[36] Storing, supra note 12.

[37] Zechariah Chafee, Jr., 62 Harv. L. Rev. 891, 898 (1949) (reviewing Alexander Meiklejohn, Free Speech: And Its Relation to Self Government (1948)).

[38] Levy, supra note 6, at 281.

> The consequence of this view, which Professor Levy's evidence strongly supports, is that it does not require evidence of some prevailing eighteenth-century libertarianism for a fair-minded historian to regard the first amendment as nonetheless a massive and deliberate denial of power in Congress over speech and press.[41]

Similarly, David A. Anderson claims Emergence merely confuses the issue of what the framers of the First Amendment intended.[42] He writes of the colonists and framers: "One must concede that no one had offered a comprehensive definition of freedom of the press. That does not, however, prove universal acquiescence in the Blackstonian meaning. We often become dissatisfied with an existing formulation before we are able to articulate an improved one."[43]

Although the Anti-Federalists may not have articulated a "comprehensive definition" of the free press clause, they did espouse one aspect of a free press (which has been largely neglected), and that will be discussed in the next section.

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[39] William W. Van Alstyne, Congressional Power and Free Speech: Levy's Legacy Revisited, 99 Harv. L. Rev. 1089, 1093 (1986) (reviewing Leonard W. Levy, Emergence of a Free Press (1985)).

[40] Id. at 1097.

[41] Id. at 1098.

[42] David A. Anderson, Levy Vs. Levy, 84 Mich. L. Rev. 777 passim (1986) (reviewing Leonard W. Levy, Emergence of a Free Press (1985)).

[43] David A. Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 523 (1983).

But whatever Levy believes the framers' intentions were, he is wrong in saying that if we look to Madison, the father of the Bill of Rights, for evidence of the meaning of the First Amendment, we also must consider the testimony of Federalists.[44] For the Federalist argument was that the new nation did not need a bill of rights or a free-press amendment at all. And on that point, the Anti-Federalists ruled the day.

III. Taxation of Newspapers

The question of intent remains: Did the Anti-Federalists articulate a position on freedom of the press, and if so, what was it?[45]

Except for the prohibition on prior restraint encompassed by Blackstone,[46] the power to tax newspapers may be the best example

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[44] Levy, supra note 6, at 281.

[45] Id. at 218-19. Levy frames the issue differently: "The realistic issue is whether any Americans repudiated the common-law doctrine that words alone can criminally assault the government, or whether any, in a more general sense, repudiated any class of criminal libel."

[46] Debate continues on the role of Blackstonian principles in the First Amendment (see, e.g., William T. Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 Colum. L. Rev. 91, 119-21 (1984)). Sir William Blackstone wrote in 1765-1769:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay

(continued...)

of a specific position on freedom of the press articulated by the Anti-Federalists. Several of these arguments will be quoted at greater length than they appear in Levy's Emergence and elsewhere to emphasize the depth and intensity some Anti-Federalist authors brought to the issue and also to accentuate the lack of attention the Anti-Federalist position on newspaper taxation has gotten. Indeed, it seems unlikely that any Federalist or Anti-Federalist specifically advocated taxes on newspapers.[47] Although this does not assure a unanimity on the issue, it would indicate a lack of controversy. Even so, Saul Cornell cautions that it is a mistake to consider the Anti-Federalists all of a mind: "[W]e must abandon the quest for the Founders' original intent and instead focus on discovering the range of original intents."[48]

One pseudonymous Anti-Federalist voice against newspaper taxes was heard on October 28, 1787. A pamphlet in Pennsylvania, similar to an earlier newspaper essay by "A Federal Republican," was addressed to "Friends and Fellow-Countrymen":

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[46](...continued)

> what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

4 William Blackstone, Commentaries *151-52 (emphasis in original). But Mayton, supra n.154 at 120, remarks that since the First Amendment encompasses speech, and speech cannot be licensed, "it makes no sense of the first amendment to interpret it along Blackstonian lines."

[47] Notwithstanding Hamilton's position, infra text accompanying note 62, that even a state constitutional provision regarding freedom of the press would not preclude a state from imposing duties on newspapers.

[48] Cornell, supra note 9, at 63 (emphasis in original).

> It hath been said that the objection with respect to the freedom of the Press is not valid, because the power of controuling that is lodged with the several states.
> A little consideration will show that this, though perhaps just in itself, is but a specious pretext. Congress have power to lay duties of whatever kind, and although they could not *perhaps* directly bar freedom of the Press, yet they can do it in the exercise of the powers that are expressly decreed to them. Remember there are such things as *stamp duties* and that these will as effectually abolish the freedom of the press as any express declaration.[49]

The author here is answering one of the Federalist responses to the call for a bill of rights; the Federalists claimed that state constitutions and bills of rights could protect the press, but the Anti-Federalists wanted assurance that a powerful central government also would be prohibited from infringing on the press. In addition, the mention of "stamp duties" is a clear reference to taxes placed on publications. The author certainly means to include a prohibition on these to assure freedom of the press.

Another well regarded and prolific Anti-Federalist known as "Federal Farmer" (widely assumed to be, but not positively identified, as Richard Henry Lee) wrote on October 10, 1787:

> I confess I do not see in what cases the congress can, with any pretense of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying duties whatever on printing, and from laying duties particularly heavy on certain pieces printed, and perhaps congress may require large bonds for the payment of these duties. Should the printer say, the freedom of the press was secured by the constitution of the state in which he lived, congress might, and perhaps, with great propriety, answer, that the federal constitution is the only compact existing between them and the people; . . . and therefore congress in exercising the powers

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[49] 3 *Storing*, *supra* note 12, at 81 (emphasis in original).

> assigned them, and in making laws to carry them into execution, are restrained by nothing beside the federal constitution . . .[50]

In a Jan. 20, 1788, essay on a bill of rights, Federal Farmer returns to the theme of taxing the press:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. . . . The people's or the printers claim to a free press, is founded on the fundamental laws, that is compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right. . . . [W]hat laws will congress have a right to make by this constitution of the union, and particularly touching the press? By art. 1 sect. 8 congress will have power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have power to lay and collect all kinds of taxes whatever -- taxes on houses, lands, polls, industry, merchandize, &c. -- taxes on deeds, bonds, and all written instruments -- on writs, pleas, and all judicial proceedings, on licenses, naval officers papers, &c. on newspapers, advertisements &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and constantly to constructions and inferences. A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are able to

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[50] 2 Storing, supra note 12, at 250. The same quote appears in Minneapolis Star, 460 U.S. at 584 (see infra text accompanying note 76), and the Court positively attributes it to Lee. 2 Storing, supra, at 215-16, discusses at some length the disputed authorship and concludes that the evidence is at best contradictory. This, however, is not to take anything away from the arguments, which accurately reflected deep-felt Anti-Federalist sentiments.

> unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be vehicles for abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, "lastly the key stone was put in the arch, by the final establishment of the freedom of the press." I shall not dwell longer upon the fundamental rights, . . . it is pretty clear, that some other of less importance, or less in danger, might with propriety also be secured.[51]

It is clear that the fear of burdensome taxes on newspapers was an issue the Anti-Federalists would not allow to die. Federal Farmer and Federal Republican express similar reservations about a strong national government with unlimited powers of taxation and, thus, control. In fact, Federal Farmer sees this power superseding state constitutions, which had been the first line of defense for Federalists in disputing the need for a federal bill of rights. (It also will be noted that Federal Farmer would allow newspapers a great deal of latitude in being "vehicles for abuse" and printing "many things not true." If having newspapers that print untruths is a "small inconvenience . . . among many advantages," Federal Farmer is presaging a view of libel it would take the Supreme Court nearly 200 years to adopt, as it did in Times v. Sullivan.[52])

Another Anti-Federalist, writing as "Centinel," speaks more generally about federal powers of control over the press. "Centinel argues that the powers of the federal government, particularly in the area of taxation and the judiciary, will destroy the states and endanger the freedom of the press and personal liberty, which are unprotected by a bill of rights."[53] Centinel, who was either Pennsylvania judge and legislator George Bryan or his son Samuel, or a combination of the talents of both,[54] wrote in the Philadelphia Freeman's Journal in late 1787 in a reply to a prominent Federalist (which included frequent mention of tax issues):

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[51] 2 Storing, supra note 12, at 329-30 (footnote omitted).

[52] New York Times v. Sullivan, 376 U.S. 254 (1964).

> As long as the liberty of the press continues unviolated, and the people have a right of expressing and publishing their sentiments upon every public measure, it is next to impossible to enslave a free nation. . . .
> Mr. [James] Wilson asks, What controul can proceed from the federal government to shackle or destroy that sacred palladium of national freedom, the liberty of the press? What! Cannot Congress, when possessed of the immense authority proposed to be devolved, restrain the printers, and put them under regulation. -- Recollect that the omnipotence of the federal legislature over the state establishments is recognized by a special article, viz. -- "that this Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges of every State shall be bound thereby . . . Does not this sweeping clause subject everything to the controul of Congress?[55]

In the preceding essay, Centinel reminded readers that Pennsylvania's bill of rights "provides and declares 'that the people have a right of FREEDOM OF SPEECH, and of WRITING and PUBLISHING their sentiments, therefore THE FREEDOM OF THE PRESS

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[53] 2 Storing, supra note 12, at 131.

[54] Id. at 130.

[55] Id. at 143-46 (footnote omitted).

OUGHT NOT BE RESTRAINED.'"[56] But Centinel also expresses the apprehension that a strong federal government could subvert even an otherwise iron-clad state constitutional guarantee.

But it was not just Pennsylvanians and Virginians who were concerned with taxation of the press. "A Farmer," identified as Col. Thomas Cogswell, chief justice of New Hampshire's Court of Common Pleas, wrote in the Freeman's Oracle on January 11, 1788: "The liberty of the Press is essential to a free people, it ought therefore to be inviolably preserved and secured in a Bill of Rights, and no duty or tax to be imposed thereon, of what name or nature soever."[57]

In New York, "Objections by a Son of Liberty" published in the New York Journal on November 8, 1787, enumerates thirteen objections to the proposed Constitution. In two instances the writer refers to freedom of the press. The first time he says a free press would be "suppressed, with a view to prevent a communication of sentiment throughout the states," under the new constitution.[58] The second reference is longer and directly links the lack of press protection with a fear of repressive taxes:

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[56] Id. 136 (Pa. Const. of 1776, Declaration of Rights arts. X, XI, XII) (emphasis in original). Levy, supra note 6, at 185, also quotes this clause, but he claims the emphasis is on "ought not," a phrase that "seems hardly binding." Further, he several times (see, e.g., id. at 244) characterizes "ought" as a "namby-pamby" word. Equally plausibly, it seems, the stress could be on a "right to freedom . . . of publishing." (emphasis added).

[57] 4 Storing, supra note 12, at 206-7.

[58] 6 Storing, supra note 12, at 35.

> . . . An odious and detestable *Stamp act*, imposing duties on every instrument of writing, . . . be barred . . . Stamp duties also, imposed on every *commercial* instrument of writing--on *literary productions*, and *particularly* on *news papers*, which of course, will be a great discouragement to *trade*; an obstruction to *useful knowledge* in *arts, sciences, agriculture*, and *manufactures*; and a prevention of *political information* through the states. . . .[59]

Storing does not indicate who "A Son of Liberty" might have been, but he does characterize the objections as "strong language regarding the destruction of liberty of the press."[60] Indeed, in the same paragraph as the above fears are expressed, "A Son of Liberty" worries that "our most innocent remarks and animadversions" on the conduct of leaders will be construed as treason.

Another New Yorker, assumed to be Melancton Smith, also argues in a pamphlet titled "Address by A Plebian," which probably was first published in the spring of 1788, that freedom of the press needs to be explicitly stated. He writes:

> It may be a strange thing to this author to hear the people of America anxious for the preservation of their rights, but those who understand the true principles of liberty, are no strangers to their importance. The man who supposes the constitution, in any part of it, is like a blank piece of paper, has very erroneous ideas of it. He may assured every clause has a meaning, and many of them such extensive meaning, as would take a volume to unfold. The suggestion that the liberty of the press is secure, because it is not in express words spoken of in the constitution . . . is puerile and unworthy of a man who pretends to reason. We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by *duties*, &c. and therefore the constitution ought to

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[59] *Id.* at 36 (emphasis in original).

[60] *Id.* at 34.

have stipulated for its freedom.[61]

As with the other Anti-Federalists previously quoted, Plebian's fears of taxes on newspapers prompt him to specifically state that they ought to be prohibited. Thus, it can be seen that in those instances in which Anti-Federalists went beyond boilerplate support for a free press provision one of the primary and clearly articulated concerns was that the power to tax newspapers must be controlled.

As evidence of the seriousness with which Hamilton viewed these specific arguments by Anti-Federalists, he added a footnote to the passage from Federalist No. 84 that was quoted at the beginning of this paper. The footnote, in full, reads:

> To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon the publications so high as to amount to a prohibition. I know not by what logic it could be maintained, that the declarations in the State constitutions, in favour of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the State legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abridgement of the liberty of the press. We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press will give it no greater security than it will have without them. The same invasions of it may be effected under the State constitutions which contain those declarations through means of taxation, as under the proposed Constitution, which has nothing of the kind. It would be quite as significant to declare that

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[61] Id. at 145 (emphasis added).

> the government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.[62]

Here, Hamilton tries to counter the Anti-Federalists' arguments by throwing back at the Anti-Federalists the states' rights issue that Van Alstyne views as critical.[63] Madison further maintains that a tax on newspapers would be acceptable, limited by a legislature responsive to public opinion. In a very practical sense, Madison additionally acknowledges that enumerating rights does not mean they will be upheld if the public is prepared to ignore them. Certainly, as will be seen in the next section, the Supreme Court has accepted Madison's position on taxation of the press.

Levy slights the tax issue in Emergence. In one instance, it merits two sentences, one of which includes a partial quote from Richard Henry Lee ("a power to destroy or restrain the freedom of it")[64] and the other a partial quote from Patrick Henry, another ardent Anti-Federalist, on the right against unlawful search in connection with collecting taxes.[65] Elsewhere, Levy returns to Lee's tax arguments but links them with opposition by Lee to a general federal tax power. Levy writes: "Richard Henry Lee . . . worried that Congress could destroy freedom of the press by taxing it; but Lee really opposed the possession of the tax power by Congress." Levy then repeats in slightly fuller form ("A power to tax the press at discretion, . . . is the power to destroy or restrain the freedom of it."[66]) Lee's argument he had previously quoted.[67] Levy concludes, "Like other Anti-Federalists, Lee pretended to assume that a federal free-press clause would limit the tax power." He then makes passing reference to Melancton Smith's apprehensions that Congress might tax the press[68] and to similar misgivings in Thomas Cogswell's "Farmer" writings.[69]

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[62] The Federalist No. 85, supra note 1, at 253.

[63] Supra text accompanying note 39.

[64] Supra text accompanying note 50.

[65] Levy, supra note 6, at 231.

By choosing to directly quote only one Anti-Federalist, Richard Henry Lee, on the taxation of newspapers issue, Levy diminishes the popular nature of the Anti-Federalists' argument. Yet, in another passage in Emergence, Levy points out that in the 1780s Massachusetts imposed a stamp tax, but, ironically, he simultaneously acknowledges the strength of public sentiment against taxes on the press.

> Massachusetts also taxed its press, and by a stamp tax no less. Desperate for revenue, the state fixed a two-penny stamp tax for every copy of a newspaper or almanac. The legislature did not intend to punish or restrain the press, but printers and editors reacted as if the year was 1765 and the legislature was Parliament. Throughout the state, newspapers shrieked that the tax violated the state

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[66] Id. at 246-47. (Levy's n.70 at 247 is wrong. It should read: Ibid., 2:329-30 **not** 2:229-30.)

[67] Supra text accompanying notes 50, 51.

[68] Levy, supra note 6, at 245. In both Emergence of a Free Press, supra note 6, and Original Intent and The Framers' Constitution, supra note 32, Levy refers to Melancton Smith as Melancthon Smith.

[69] Id. 248.

> constitution's free press clause and threatened economic ruination. The most common argument was that by hurting sales the tax had the effect of preventing some citizens from being informed about public men and measures. The tax provoked such widespread and intense opposition that the legislature repealed it in the same year but replaced it with a tax on advertisements. Despite a comparable reaction in the press, the new tax lasted until 1787 when the legislature repealed it because it brought in a lot of protest and little revenue.[70]

The paradox here is that even with a state constitution that contained a free press clause, the legislature was able to pass a newspaper tax, and it was the same public (and newspaper editors) that Levy and others have said had no clear understanding of what freedom of the press meant that prevailed on the legislature to repeal the tax. Levy's own example is the evidence that there was a widely understood and accepted meaning of the phrase "freedom of the press." Once again, this demonstrates the depth of feeling against newspaper taxes that current scholars have minimized or overlooked. However, Levy seems closer to getting it right when he says: "Apparently to many Anti-Federalists, an unrestrained press meant an untaxed press . . ."[71] It seems an odd statement to make after glossing over the few Anti-Federalist comments he included on the issue.[72]

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[70] Id. at 214 (footnote omitted).

[71] Id. at 247 (emphasis added).

[72] In Levy, supra note 32, at 210-11, he comes to a different conclusion: "To understand its framer's intentions, the amendment should not be read with the focus only on the meaning of 'the freedom of the press.' It should also be read with the stress on the opening clause: 'Congress shall make no law. . . .' In part, the injunction is intended and understood to prohibit any congressional regulation of the press, whether by means of
(continued...)

To say that the Anti-Federalist position on taxing newspapers has not prevailed would be the height of understatement; to say that they failed to articulate a position on freedom of the press is overstatement. What the Supreme Court has ruled on the issue during the last 200 years is irrelevant to the argument that the Anti-Federalists failed to articulate a position on freedom of the press.

IV. Supreme Court Cases

The Supreme Court referred to the Anti-Federalist position on taxation of newspapers in the 1985 Minneapolis Star case involving a state use-tax on paper and ink.[73] In the Minneapolis Star case, the Court held that states cannot single out the press for special treatment because the threat of burdensome taxes becomes acute and threatens freedom of the press.[74] This was the Anti-Federalists' argument, but they, of course, were saying that

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[72] (...continued) censorship, a licensing law, a tax, or a sedition act. The Framers meant Congress to be totally without power to enact legislation respecting the press, excepting copyright laws."

[73] Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). Cf., Grosjean v. American Press Co., 297 U.S. 233 (1936).

[74] Supra note 15, at 583. The Court further notes, "[T]his Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, e.g., Oklahoma Press Publishing Co. v. Walling [327 U.S. 186] at 194; Mabee v. White Plains Publishing Co. [327 U.S. 178] at 184; Associated Press v. NLRB [326 U.S. 1] at 132-133, suggesting that a regulation that singled out the press might place a heavier burden of justification on the State." (Footnote omitted).

no taxes should be applied to newspapers.

Justice O'Connor, writing for the Court, viewed the case as one falling under the general principles of the First Amendment.

> "There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment. It is true that our opinions rarely speculate on precisely how the Framers would have analyzed a given regulation of expression. In general, though we have only limited evidence of exactly how the Framers intended the First Amendment to apply. . . . Consequently, we ordinarily simply apply those general principles, requiring the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding government interest. . . . But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone.[75]

Justice O'Connor goes on to quote from Richard Henry Lee's comments on taxation and freedom of the press.[76] Here, the Court has acknowledged the role of the Framers' intent in interpreting current law but has not gone as far as the Anti-Federalists' arguments against taxation. This is troubling for two reasons: Taxation of newspapers was one area in which those Anti-Federalists who did write about specifics were clear, and the Anti-Federalists were the prevailing party in the struggle for a bill of rights. And although it seems a settled part of the law that newspaper receipts or income may be taxed on a "nondiscriminatory" basis[77] (and it is not the purpose here to dispute that), the Court did not explicitly acknowledge that some Anti-Federalists called for no taxes whatsoever on newspapers.

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[75] Minneapolis Star, 460 U.S. at 583 and accompanying footnote.

[76] See supra note 50 and accompanying text.

[77] See, e.g., Minneapolis Star, 460 U.S. 575, n.9 at 586-87.

However, the Court continued that even a lighter tax than imposed on other businesses

> threatens the press not only with the current differential treatment, but also with the possibility of subsequent differentially more burdensome treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions."[78]

Here, the Court got closer to the substance of the Anti-Federalists' taxation argument concerning intimidation of the press by a powerful government.

If the Anti-Federalists' writings, as compiled by Kenyon or Storing, had been available to an earlier Court, perhaps the Court would have made reference to them. As it was, Justice Sutherland, writing for the Court in Grosjean, a 1936 Louisiana case involving a punitive tax on newspapers in retaliation for political criticism, said:

> The framers of the First Amendment were familiar with the English struggle [against taxation of newspapers] . . . [and] the predominant influence [for the first amendment] must have come from the English experience.[79]

In Grosjean, the Court ruled a Louisiana newspaper tax was unconstitutional, but the Court did a disservice to the Anti-Federalists by not recognizing their contribution, separate from that of the "framers of the First Amendment," toward adoption of the First Amendment. Because the Anti-Federalist argument for a bill of rights was accepted, their arguments on taxation and other issues should have been given greater credence.

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[78] Id. at 588 (footnote omitted). Cf. White, J., concurring, at 594, Rehnquist, J., dissenting, at 601-02, (asserts the Court is capable of distinguishing differentially **more** burdensome taxes).

[79] Grosjean v. American Press Co. 297 U.S. at 249 (emphasis added).

More recently, two cases have reflected the precedents established by Grosjean and Minneapolis Star. In Arkansas Writers' Project[80] the Supreme Court held that a state scheme that taxes general-interest magazines but exempts newspapers and religious, professional, trade, and sports journals, violates the First Amendment, even without evidence of improper censorial motive. Additionally, Arkansas failed to show that a compelling state interest was served by such a discriminatory tax scheme.

In Leathers v. Medlock,[81] the Court held that Arkansas could extend a generally applicable sales tax to cable television while exempting print media without violating the First Amendment. The Court said that such a tax scheme was not directed at suppressing particular ideas or content, nor, because of its general applicability, does it hinder the watchdog role of the press. Further, the Court said, there was no indication the cable television industry was targeted in a purposeful attempt to interfere with its First Amendment rights.

To summarize these cases, the Court has ruled unconstitutional, absent a compelling state interest, those tax structures with the intent of preventing people from acquiring information, those based on the size of the medium affected, and those related to the contents. But the Court has ruled as constitutional tax structures that differentiate between one medium and another.

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[80] Arkansas Writer's Project v. Ragland, 481 U.S. 221 (1986).

[81] Leathers v. Medlock, 111 S.Ct. 1438 (1991).

Although the Court has not accepted the Anti-Federalists' position that no tax should be applied to the press, it has recognized that there is a heavy burden on states to show such taxes to be narrowly drawn to serve compelling state interests. Thus, one of the legacies of the Anti-Federalists is a heightened recognition by the Supreme Court of the special place the press holds with regard to taxation under the Bill of Rights. And, at least on the ground that there be no discriminatory taxation, the Anti-Federalist argument has held for 200 years.

Had it not been for a quirk of history that gave Anti-Federalist writings secondary importance to those of the Federalists, current law on taxation of newspapers, and by implication other ideas espoused by the Anti-Federalists, might have been different. It seems unlikely the Court will overturn its previous decisions on the basis of recently compiled Anti-Federalist positions, but these writings yet may provide fodder for future cases.

V. Opportunities for Further Inquiry

Levy's analysis of the Anti-Federalists primarily focuses on the issues of prior restraint and seditious libel, both of which, as with taxation of newspapers, have a been adjudicated.[82] And Levy's work, as has been seen, has been much criticized by Anderson and others. But, in addition to Levy's lack of close examination of the taxation issue, what others have failed to recognize is that Levy has accepted fully the historians' consensus view of the Anti-Federalists. By their oversight of the historiography of the Anti-Federalists, others, too, have acquiesced to the view that the Federalists and Anti-Federalists were more similar than they were different. A Beardian approach would emphasize the differences between the groups.

Finally, perhaps it should be said that the answer to the question of what the Anti-Federalists meant by "freedom of the press" will not be found where legal scholars and historians have been looking. Perhaps the social and cultural aspects of the Anti-Federalists' lives will have more bearing on the meaning of freedom of the press than will their documents. Of course, such an approach would require a greater degree of interpretation, but it may provide a more reasonable answer to the question than Bork, Chafee, Levy and others have offered, to wit: not very much.

Such a cultural approach would require a synthesizing of the philosophic, political, economic, social and other histories of the era, while maintaining the focus on freedom of the press. As James W. Carey wrote:

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[82] Levy, supra note 6, passim. The key case involving prior restraint is Near v. Minnesota, 283 U.S. 697 (1931); for libel, the landmark case is New York Times v. Sullivan, 376 U.S. 254 (1964).

> The task of cultural history, then is this recovery of past forms of imagination, of historical consciousness. The objective is not merely to recover articulate ideas or what psychologists call cognitions but rather the entire "structure of feeling": "The most difficult thing to get hold of, in studying any past period, is this felt sense of the quality of life at a particular time and place: a sense of the ways in which the particular activities combine into a way of thinking and living."[83]

In the context of this topic, to offer one example, such a cultural history might place special emphasis on the American colonies' experience with the Stamp Act of 1765, which included requiring tax stamps for newspapers and official documents. Protests, some violent, swept the colonies, and the law was so widely defied as to be ineffectual. A Stamp Act Congress was called, and it urged the British Parliament to repeal the measure, proclaiming that there could be no taxation without representation. A boycott of British goods put further pressure on Parliament, which eventually repealed the measure. This and other victories gave the colonists a sense of power over their own lives. Is it any wonder, with a tax on newspapers over which blood had been spilled, that only 21 years later the Anti-Federalists would be so adamant on the tax issue in their arguments over a bill of rights? The "felt sense of the quality of life" for the colonists will not be found just in the Stamp

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[83] James W. Carey, The Problem of Journalism History, 1 Journalism History 3 (1974) (quoting Raymond Williams, The Long Revolution, 47 (1966)).

Act documents, but it can be seen in the way they lived their lives and handled this and many other matters.

It may turn out that an interdisciplinary, cultural approach to the era will uncover no more about the intent of the Anti-Federalists than we already know. But we probably know as much as we ever will from a direct examination of their writings, and the question has not been sufficiently answered. As Benjamin Franklin, the best known American printer, said about freedom of the press: "[F]ew of us, I believe, have distinct Ideas of its . . . Nature and Extent."[84] Alexander Hamilton made the same point in the excerpt from The Federalist at the beginning of this paper: "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable . . ."[85]

It is probably time for a perspective different from that of historians and legal scholars. A cultural approach grounded in journalism could provide just such a perspective.

VI. Conclusion

There can be no doubt of an Anti-Federalist role in assuring the Bill of Rights and the press clause within it. On the issue of a clearly articulated concept of freedom of the press, we have an ambiguous history. Certain issues, including the power to tax newspapers, were sporadically but clearly stated. This supports this paper's thesis in that the Anti-Federalist articulated a position in at least one area of press freedom: taxation of newspapers. Further support comes from the Supreme Court, which has recognized this position in modified form to allow non-discriminatory taxation of newspapers. On at least that basis, the Anti-Federalists have prevailed. In other respects, the phrase "freedom of the press" appears to be something of an 18th century bromide in which the meaning is both widely assumed and less than clear. Further research is needed to determine the meaning behind the phrase that was on the lips and in the writings of many Anti-Federalists.

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[84] Rutland, supra note 2, at 91 (footnote omitted).

[85] The Federalist No. 84, supra note 1, at 252-53.

Independent State Constitutional Analysis in Defamation Litigation: State High Court Decisions, 1986-1991

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Abstract

A number of state high court opinions since 1986 indicate the growing impact of judicial state constitutional analysis in defamation litigation. The re-emergence of a state constitutional rationale for deciding libel conflicts reflects state court efforts to refine unsettled areas of libel law existing within the present matrix of federal constitutional constraints. A survey of state high court decisions in the past five years suggests a growing willingness on the part of state high courts to consider independently the scope of state constitutional protection for media defendants in defamation cases. In doing so, state high courts increasingly are finding additional security for press freedoms in the provisions of their state constitutions.

This paper is an exploratory assessment of state constitutional analysis in recent defamation cases. Part one considers opportunities for state court autonomy in libel law. Part two examines the framework of state and federal standards which structure modern defamation litigation and discusses the recent judicial approaches state high courts have used to resolve reputational disputes. Part three considers state high court defamation decisions between 1986 and 1991 in which state constitutional issues were addressed. The issues, cases and opinions examined in this study point to an invigorated role for state constitutional analysis in defamation litigation.

Independent State Constitutional Analysis in Defamation Litigation: State High Court Decisions, 1986-1991

Jurists and legal scholars place much blame for the current morass that is libel law on the shortcomings of federal constitutional interpretations. The common law's emphasis on truth or falsity has been inexorably supplanted by a constitutionally based conundrum of "substantive principles, evidentiary rules, and de facto innovations in judge-jury roles and other procedural matters."[1] Protections for expression created by the U.S. Supreme Court in the past three decades have promoted a system in which most libel claims are "judicially foreclosed"[2] after protracted and expensive litigation. The way things stand, libel law often fails both plaintiffs and defendants: it does not provide adequate protection for reputation and it chills freedom of expression.[3] Plaintiffs commonly win jury verdicts[4] only to see higher courts routinely reverse these decisions on constitutional grounds.[5] In the past few years, various proposals calling for wholesale or limited changes in libel law and litigation have been offered.[6] However, the present system is deeply entrenched; it does not appear as if major revolution in libel law is imminent. According to David Anderson, "[t]here is no political constituency for statutory reform, and little room within present constitutional constraints for innovation by state courts."[7]

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[1] Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 454 (1991).

[2] *Id.* at 489.

[3] *See, e.g.* Jones, *Libel Study Finds Juries Penalizing News Media*, N.Y. Times, Sept. 26, 1991, at A3, col. 5 (natl. ed.). ("More and more juries are awarding huge sums in libel cases . . . . Such judgments have proved so potentially devastating to even the largest news organizations that some of them are settling with plaintiffs rather than risking a loss on appeal.").

[4] *See, e.g., News Notes: LDRC Finds Increase in Media Damage Awards*, 19 Med. L. Rptr. No. 9 (Oct. 8, 1991). (A Libel Defense Resource Center survey indicates that in 1989-1990, media defendants lost 66% of jury trials, up from 58% in 1987-1988).

[5] *See, e.g., Libel Awards Soaring in Suits Against Media*, Editor and Publisher (Oct. 12, 1991). (According to a survey by the Libel Defense Resource Center, only 28.7% of libel awards between 1980 and 1990 were upheld on appeal. *Id.* at 16).

But in recent years, state courts have exhibited some degree of independent innovation in defamation cases. In fact, a number of state high court opinions since 1986 indicate the growing impact of judicial state constitutional analysis in defamation litigation. The re-emergence of a state constitutional rationale for analyzing libel conflicts reflects state court efforts to refine unsettled areas of libel law within the present system of federal constitutional constraints. A survey of state high court decisions in the past five years suggests a growing willingness on the part of state high courts to consider independently the scope of state constitutional protection for media defendants in defamation cases. In doing so, state high courts increasingly are finding additional security for press freedoms in the provisions of their state constitutions, a trend which has added a new wrinkle to the contorted face of defamation law.

This paper is an exploratory assessment of state constitutional analysis in recent defamation cases. Part one considers opportunities for state court autonomy in libel law. Part two examines the framework of state and federal standards which structure modern defamation litigation and discusses the recent judicial approaches state high courts have used to resolve reputational disputes. Part three considers state high court defamation decisions between 1986 and 1991 in which state constitutional issues were addressed. The issues, cases and opinions examined in this study point to an invigorated role for state constitutional analysis in defamation litigation.[8]

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[6] *See, e.g.*, THE ANNENBERG WASHINGTON PROGRAM PROPOSAL FOR THE REFORM OF LIBEL LAW (1988); R. BEZANSON, G. CRANBERG AND J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY (1987); Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 Calif. L. Rev. 847 (1986); Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 Calif. L. Rev. 809 (1986). *See also*, proposed state bills for modifying libel law: Illinois (H.B. 590, Ill. Leg. 85th Cong.); Iowa (Senate File 40); Connecticut (H.B. 5932, Conn. Leg.); and California (S. 1979 Cal. Leg., Reg. Sess.).

[7] Anderson, *supra* note 1, at 552.

State Autonomy and the Constitutionalization of Defamation Law

Day-to-day jurisdiction over press freedom emerged from the political conflicts of the late eighteenth century as a state responsibility[9] and in general, remained so until well into the twentieth century.[10] State constitutional provisions for liberty of the press pre-dated the federal First Amendment,[11] and the various state constitutional ratifying conventions were responsible for generating a list of recommendations used by James Madison in fashioning the federal Bill of Rights.[12] U.S. Supreme Court Chief Justice John Marshall endorsed the system of federalism in the field of civil rights with his opinion in *Barron v. Baltimore* (1833).[13] Marshall made it clear that the limitations on government intervention set out in the federal Bill of Rights applied only to the federal government and did not pose a threat to state autonomy in areas of liberty associated with state bills of rights.[14] Citizens' rights were and are doubly insured by layers of constitutional protection against government encroachment at both the state and federal levels—a system of dual sovereignty.[15]

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[8] Multi-layered searches of the Lexis data base generated the main body of case law used in this study. The searches were designed to identify cases heard by state high courts between 1986 and 1991 in which state constitutional provisions for freedom of the press were considered. The author will provide a record of the search strategy on request.

[9] *See generally*, The Federalist No. 45 at 292-93 (J. Madison) (C. Rossiter ed. 1961). ("The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the state.").

[10] With decisions such as Gitlow v. New York, 268 U.S. 652 (1925) and Stromberg v. California, 283 U.S. 359 (1931), the Supreme Court used the language of the Fourteenth Amendment to apply First Amendment interpretations to the states and began consistently to make freedom of expression a matter of federal concern. *See generally*, ELDREDGE, THE LAW OF DEFAMATION, 252-54 (1978).

Absent consistent interference from the federal judiciary, the body of state defamation law diversified and expanded inexorably from the 1700s through the early 1900s as each state refined the scope of its constitutional protection for the press. The varied development and often restrictive interpretations of defamation law at the state level eventually led the U.S. Supreme Court to set uniform, constitutional standards for press freedom at the national level.[16]

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[11] *See generally*, B. SCHWARTZ, ROOTS OF THE BILL OF RIGHTS, 2 vol. (1980). (Only two of the twelve "new" state constitutions adopted between 1776 and 1784 did not provide for a free press either in the body of the constitution or in a separate bill of rights. The federal First Amendment became law in 1791.).

[12] *See generally*, L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 145 (1988).

[13] 59 U.S. (Pet.) 243 (1833).

[14] "Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the power of its particular government, as its judgment dictates . . . . [The provisions in the federal Bill of Rights] are limitations of [the] power granted in the instrument itself; not of distinct governments, framed by different persons for different purposes." *Id.* at 247.

[15] *See*, Brennan, *State Constitutions and the Protection of Individual Liberties*, 90 Harv. L. Rev. 489, 503 (1977).

Although the federal judiciary assumed ultimate control over the field of expressive freedom in this century, libel law still is largely state law. An analysis of federal defamation law leads only to an understanding of general boundaries, "[b]ut important variations in the law from state to state exist."[17] Perhaps nowhere is the diversity of legal standards and judicial approaches or attitudes more evident than in defamation cases where the state courts are called upon to consider the range of protections for expression which exist under common law doctrine, state statutes, and the federal and state constitutions. Defamation law has retained its heterogeneous nature in spite, and sometimes directly because, of the federal judiciary's assumption of authority in the field of expression since the 1920s.[18] And while all states and the federal government constitutionally protect the press, more than forty states still have speech and press provisions quite different from the First Amendment.[19]

To be sure, however, Supreme Court decisions in the past three decades have reshaped the contours of libel law and fundamentally altered the manner in which disputes over damage to reputation are resolved.[20] Common law defamation standards—which defined the law of libel throughout most of American history—made criticism of official conduct a risky undertaking and promoted a system of self-censorship.[21] The common law doctrine of libel lost much of its controlling influence with the Supreme Court's articulation of constitutional standards for libel.[22]

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[16] *See generally*, C. LAWHORNE, THE SUPREME COURT AND LIBEL, (1981).

[17] *See*, D. PEMBER, MASS MEDIA LAW, 108 (Fifth Ed. 1990).

[18] For an overview of the federal judiciary's assumption of its role as final arbitrator over expression rights, *see generally*, Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y. L. Rev. 535, 535-45 (1986).

[19] Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article 1 Section 7 of the Iowa Constitution*, 38 Drake L. Rev. 9, at 14-15 (1988-1989).

The leading case in the constitutionalization of libel law was *New York Times v. Sullivan*,[23] in which the U.S. Supreme Court said that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, knowledge that it was false or with reckless disregard of whether it was false or not."[24] But while *Sullivan* was intended to encourage and safeguard open discussion of government and public officials, constitutional protections for expression in cases involving other subject matters and plaintiff categories have expanded to the point where constitutional rules provide a framework for most libel decisions.

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[20] *See*, Anderson, *supra* note 1, at 488 n. 2. (Anderson lists chronologically the 27 libel cases decided by the U.S. Supreme Court since its landmark ruling in New York Times v. Sullivan, 376 U.S. 254 (1964).

[21] *See*, Anderson, *supra* note 1, at 510. *See also*, Sisler v. Gannett Co., Inc., 104 N.J. 256 (1986). ("Generally, the [state common law] favored allowing defamation actions to go forward at the expense of the values embodied in constitutional free speech." *Id.* at 262).

[22] Certain defamation issues still can trigger common law analyses. In the past five years, a number of state high court defamation decisions have been based on common law doctrine. *See, e.g.*, Jacobs v. Frank, 573 N.E.2d 609 (Ohio 1991); Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990); Mittelman v. Witous, 552 N.E.2d 973 (Ill. 1989); (certain forms of communication enjoy a common law qualified privilege). *See also*, Dairy Stores, Inc., 516 A.2d 220 (N.J. 1986); Sisler v. Gannett Co., Inc., 104 N.J. 256 (1986); (common law fair comment privilege).

[23] 376 U.S. 254 (1964).

[24] *Id.*, at 279-80.

Moreover, the emergence of a constitutional rationale for safeguarding expression rights actuated a judicial requirement "that has had far greater practical effect than the actual malice rule itself."[25] *Sullivan* indicated that judges should independently review all jury findings of actual malice and authorized courts to overturn jury decisions if they considered the evidence of actual malice constitutionally insufficient.[26] The independent review requirement was refined with the 1984 decision in *Bose Corp. v. Consumers Union of U.S., Inc.*[27] Here the U.S. Supreme Court held that in public official libel cases where the actual malice standard applies, appellate judges "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."[28] The Court reasoned that this rule of independent appellate review would deter "forbidden intrusion [into] the field of free expression."[29] But while

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[25] Anderson, *supra* note 1, at 494.

[26] 376 U.S. 254, 284-85. *See also*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 55 (1971); Greenbelt Coop. Publishing Ass'n. v Bresler, 398 U.S. 6, 11 (1970).

[27] 466 U.S. 485 (1984).

[28] *Id.* at 514. *See also*, Brown v. K.N.D. Corp., 529 A.2d. 1292 (Conn. 1987). (The Supreme Court of Connecticut found that the purpose of the combined *Sullivan* and *Bose* standards "is obviously to require an independent second opinion when free speech is curtailed. [This] places the ultimate constitutional responsibility on appellate courts to render that second opinion in order to safeguard free expression." (*Id.* at 1295). The Connecticut court, however, did not fully endorse the review requirement, stating that "[w]e fail to see how allowing an appellate court to conduct an independent review and to draw its own inferences from the facts and to find liability, where the trial court has found that none exists, advances the cause of freedom of expression." (*Id.*)).

[29] 466 U.S. 485, 499 (internal citations omitted). *See also*, FRANKLIN & ANDERSON, MASS MEDIA LAW (Fourth Ed. 1990). ("[S]ome courts have decided that the *Bose* review is to be undertaken only in cases in which the defendant

Bose may indeed represent an additional barrier to a successful libel suit, it encourages state appellate courts to develop and articulate their own boundaries for the field of free expression by requiring case-by-case analysis of allegedly libelous material in actions that could raise federal and/or state constitutional questions.

Through rulings such as *Sullivan* and *Bose*, the constitutionalization of libel law has increased judicial authority in defamation litigation, a development conducive to independent state constitutional analysis. The U.S. Supreme Court has further "transferred power from juries to judges . . . by encouraging trial judges to grant defendants' motions for summary judgment."[30] Summary decision-making requires judges—not juries—to make a number of pivotal, independent determinations in libel actions involving plaintiff status and defamatory meaning.[31]

In 1974, the Supreme Court in *Gertz v. Welch*[32] held that all plaintiffs must prove at least negligence to win a libel judgment

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has lost at the trial level—that ordinary appellate review is to apply to cases in which the defendant prevailed at trial." *Id.* at 311).

[30] Anderson, *supra* note 1, at 498. "Historically, this denial of jury power in the name of the First Amendment is ironic, to say the least. Libel law reformers of the eighteenth century believed that the salvation of free speech lay in the transfer of power to juries." *Id.* at 539.

[31] *See generally*, Soloski, "Libel Law and Journalistic Malpractice: A Preliminary Analysis of Fault in Libel Litigation," Paper presented to the Law Division at the annual convention of the Association for Education in Journalism and Mass Communication, Boston, August 1991. (This paper reflects the results of a study of 947 libel cases decided between 1976 and 1990. Researchers found that "[i]n only 18.6 percent of the cases in the study was a verdict returned by a jury or a judge. . . . Most libel cases are won by the media on summary judgment. . . . Summary judgment is the most frequent way of resolving libel suits brought by public plaintiffs because the law requires courts to grant summary judgment unless the plaintiff has shown that the media acted with malice by clear and convincing evidence." *Id.* at 8 (internal citations omitted)).

[32] 418 U.S. 323 (1974).

against a mass media defendant. *Gertz* ensured that most defamation actions would trigger a constitutional analysis. And while the ruling left intact *Sullivan's* actual malice fault requirement for public figures, the decision left states free to frame their own rules in cases involving private plaintiffs provided the standard of care is at least negligence.[33]

Following *Gertz*, the state courts were permitted to develop local tiers of protection extending "above and beyond [the] federal constitutional floor"[34] in defamation actions brought by private plaintiffs, and state court reactions to this federally endorsed autonomy were predictable. The negligence standard itself has been variously applied and interpreted,[35] and as one commentator has observed, ongoing "definition of the term *negligence* will undoubtedly vary from state to state and possibly from judge to judge within a state."[36]

Dual Sovereignty, the New Judicial Federalism and State Court Approaches to Defamation Litigation

The American Civil Liberties Union's recent decision to concentrate more resources at the state level and turn to state constitutions for the expansion of civil liberties[37] was no doubt prompted in part by an increasingly conservative federal judiciary. But the current U.S. Supreme Court, while at times interpreting the Constitution narrowly, has expressed a willingness to respect independent state court interpretations based on state constitutional provisions.[38] The ACLU's change in tactics acknowledges the influence and autonomy of state courts under our dual sovereignty system of federalism and underscores the potential significance of state constitutional press provisions for safeguarding individual rights and expression freedoms.

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[33] *Id.* at 347.

[34] Brennan, *supra* note 18, at 550.

[35] *See, e.g.*, Franklin & Anderson, *supra* note 29. ("[A]lthough most states have applied the preponderance of evidence standard in *Gertz* cases, Ohio has decided to require clear and convincing evidence of negligence in a *Gertz* case as a matter of law." *Id.* at 334. (citing Lansdowne v. Beacon Journal Publishing Co., 32 Ohio St.3d 176; 152 N.E.2d 979 (1987).).

[36] Pember, *supra* note 17, at 153 (emphasis in original).

California's constitutional declaration that "[r]ights declared in this constitution are not dependent on those guaranteed in the U.S. Constitution"[39] is a codified characterization of the state constitution as an independent and dynamic legal insurance policy for the rights of Californians. And although this is an unusual constitutional provision, the same attitude toward independent state constitutional interpretation has surfaced in the published opinions of many state high courts in the last 20 years.

The early 1970s saw a revival of independent state constitutional interpretation by state high courts, a trend U.S. Supreme Court Justice William Brennan referred to in 1986 as "the most important development in constitutional jurisprudence of our times."[40] Often called the "new judicial federalism," the development represents a renewed willingness[41] on the part of state courts to decide rights cases on state constitutional grounds and create local climates of deference for these rights which go beyond the minimum levels or "federal floor"[42] established by the Supreme Court.

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[37] Holmes, *Frustrated by Change in Federal Courts, A.C.L.U. to Concentrate on States*, New York Times, sec. A, p. 11, col. 1 (natl. ed., Sept. 30, 1991).

[38] *See, e.g.*, Rehnquist, quoted in Lardner, *50s Memos Illustrate Rehnquist Consistency*, Washington Post, July 20, 1986, p.1 col. 4, at p. 14 col. 4; cited in Collins, *Looking to the States*, Natl. L. Jour., Sept. 29, 1986.
(Chief Justice Rehnquist has stated that "[i]n the fields of liberty as well as property, the states must be left to work out their own destinies within broad limits." *Id.* at p. s-2).

[39] Cal. Const. art. I § 24.

The new federalism approach has figured most prominently in criminal procedure and equal protection cases.[43] However, strains of the new federalism, with its emphasis on independent state constitutional analysis, have appeared in many areas of press law. A 1986 study[44] of more than 300 rights decisions based on independent interpretation of state constitutions included cases dealing with access to courts and records,[45] source confidentiality[46] and obscenity.[47] Newer data collected in the course of current research suggests that independent state constitutional analysis continues to impact these same areas of press law.[48] More generally,

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[40] Brennan, Speech to the Executive Committee of the American Society of Newspaper Editors, at 21-22 (Oct. 10, 1986).

[41] *See generally, Freedom of Expression under State Constitutions*, 20 Stan. L. Rev. 326 (1968); Project Report: *Toward an Activist Role for State Bills of Rights*, 8 Harv. C.R.-C.L. L. Rev. 280 (1973). (Particularly in the 1950s and 1960s, litigation of individual rights cases under state constitutions slowed as the federal judiciary dominated the field while "incorporating" most of the Bill of Rights provisions within the scope of the Fourteenth Amendment and applying these standards to the states).

[42] *See, e.g.*, Brennan, *supra* note 18. ("[T]he Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection . . . . [T]he Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor . . . . While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment." *Id.* at 550) (emphasis in original).

[43] *See generally*, Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 Judicature 100 (1987); Collins and Galie, *Cases*, Natl. L. Jour., Sept 29, 1986, Special Section: State Constitutional Law, at pp. s-8-14.

[44] Collins & Galie, *supra* note 43, at pp. s-8-14. (This report lists and categorizes more than 300 cases, the vast majority of which were decided between 1970 and 1986, in which "state high courts *independently* relied on their own state constitutions to allow for either an equivalent or broader measure of individual rights protection than currently recognized by the U.S. Supreme Court in interpreting the federal Constitution." *Id.* at p. s-8, (emphasis in original)).

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[45] *See, e.g.*, Kearns-Tribune Corp. v. Lewis, 685 P.2d 515 (Utah 1985).

[46] *See e.g.*, Matter of Contempt of Wright, 700 P.2d 40 (Idaho 1985).

[47] *See e.g.*, Bellanca v. New York State Liquor Authority, 429 N.E.2d 765 (N.Y. 1981).

[48] Access to courts and records: In cases involving access to courts and records, state diversity abounds, and state courts have sometimes found a right of access under state constitutional provisions that is greater than the level of protection for newsgathering required under federal law. A variety of statutory, common law or constitutional arguments can be raised in a case involving access to courts or their records. At least 23 state constitutions provide some protection for access to judicial proceedings, and courts have recognized both a common law and a First Amendment right of access to judicial records.

State courts often are required to weigh the public (and press) interest in access against privacy, fair trial or administrative concerns. In recognition of this "balancing of interests" conflict so common to such cases, the U.S. Supreme Court has suggested that "[the] decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." (Nixon v. Warner Communications. 435 U.S. 591, 598 (1978)). Because many access decisions come down to a court's discretion as to what rules apply, cases often do not require consideration of state constitutional provisions and can be resolved—in either direction—on common law, state statutory or federal constitutional grounds.

However, state constitutional provisions have been addressed directly on a regular basis by state high courts in the past five years when conducting access analyses. In Idaho, for example, the state Supreme Court found that a lower court's closure of a preliminary hearing, based on a state statute did not violate the open court mandate of the Idaho Constitution (Cowles Pub. Co. v. The Magistrate Court of the First Judicial District of the State of Idaho, 800 P.2d 640, Idaho (1990)). The same type of constitutional/statutory conflict was similarly resolved by the California Supreme Court in 1988 in three cases involving access to court records (McClatchy Newspapers v. Superior Court of Fresno County; Capital Cities Communications, Inc. v. Superior Court of Fresno County; Grand Jury for Fresno County v. Superior Court of Fresno County; 751 P.2d. 1239 (Cal. 1988). But in a strong dissent, Justice Stanley Mosk, an outspoken proponent of independent state constitutional interpretation for safeguarding individual rights, maintained that the public's right to know is implicit in the California Constitution, and ". . . that in a democratic society an evil is never corrected by suppression or censorship; it is made right by exposure to the marketplace of thought, discussion and controversy." (*Id.* at 1344). Other state high courts have demonstrated a similar willingness to consider, independently, the scope of their state constitutional provisions in recent cases involving access to courts and records (*see, e.g.*, Gannett Co. v. State of

Delaware, 571 A.2d 735 (Del. 1990); In the matter of the application of V.V. Publishing Corp., 577 A.2d 412 (N.J. 1990)).

A recent line of cases regarding open meetings also has reflected independent state constitutional analysis (*see, e.g.*, Associated Press v. Board of Public Education, 804 P.2d 376 (Mont. 1991); Abood v. League of Women Voters of Alaska, 743 P.2d 333 (1987)).

Source Confidentiality: Legal actions concerning the protection of confidential news sources present numerous options and approaches for resolving conflict at the state court level. A majority of states now have statutes, or shield laws, granting reporters a limited privilege to refuse to testify and reveal their sources in court proceedings. In California, the newsperson's shield law is part of the state Constitution (*see*, Cal. Const. art. I, § 2 subd. (b)).

While some state courts have opted to discuss questions of source confidentiality from a perspective centering on federal constitutionality (*see, e.g.*, Sinnitt v. Boston Retirement Board, 524 N.E.2d 100 (Mass. 1988); Cohn v. Cowles Media Co., 457 N.W.2d 199 (Minn. 1990)), and other courts have conducted joint state and federal constitutional analyses (*see, e.g.*, In re: Grand Jury Proceedings (Ronald Ridenhour, petitioner), 520 So.2d 372 (La. 1988); In re: Denis Letellier, 578 A.2d 722 (Maine 1990)), this area of law has produced a line of judicial thought in the last five years that reflects vividly the new federalism approach.

For example, in O'Neill v. Oakgrove Const., 523 N.E.2d 277 (N.Y. 1988), the high court of New York held that compelled disclosure of unpublished photographs lies beyond the scope of the state shield law and is instead a matter striking at the core of state press freedom. In a majority opinion, the court stated that "[t]he guarantee of a free press in N.Y. Constitution art. I, § 8, independently mandates the protection afforded by the qualified privilege to prevent undue diversion of journalistic effort and disruption of press functions"(*Id.* at 280). Moreover, the court indicated that the singular history and tradition of protecting the liberty of the press in New York demands "particular vigilance by the courts of this State in safeguarding the free press against undue interference" (*Id.* at 281). This line of reasoning, based on judicial recognition of a heightened local standard of press protection, led the court to anchor its decision ". . . on an adequate and independent ground under our State Constitution" (*Id.* at 278).

Obscenity: Local standards are directly interwoven with obscenity law. In the wake of the U.S. Supreme Court's 1973 decision in Miller v. California, 413 U.S. 15 (1973), which among other requirements calls for an application of contemporary community standards when assessing potentially obscene material, communities have sought to regulate "obscenity" using measures such as statutes and zoning regulations. At least 19 states, for example, have made possession of child pornography a crime (*see*, Pember, *Update for Mass Media Law*, 20 (1991).

Several obscenity decisions involving independent state constitutional analysis have emerged from state high courts in recent years that bear mention within the context of this study. In a New York case involving an "adult" bookstore (The People of the State of New York v. P.J. Video, Inc., 483 N.E.2d 1120 (1985), the state high court determined that a search warrant authorizing the seizure of allegedly obscene videos was improperly issued. The court majority reached this conclusion through an independent state-law analysis, stating that "[w]hile we accord the Federal courts the greatest it appears that the states most active in employing the new federalism to create higher levels of protection for individual rights prior to 1986,[49] are continuing to conduct independent state constitutional analyses in rights cases,[50] and the trend appears to be gaining momentum in other states.[51]

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respect, we are not bound by their decisions . . . ." (*Id.* at 1125). A dissenting judge argued that the applicable state obscenity statute (N.Y. Penal Law I 235.00) was adopted with the "express purpose" of incorporating the federal *Miller* standard into New York law and as a consequence, "it cannot fairly be said that the majority opinion" rests upon adequate and independent state grounds (*Id.* at 1128, Jasen, J. dissenting).

Four years later, in a case involving the Happy Hour Bookstore (In the matter of the Town of Islip v. Caviglia, 73 N.Y.2d 544 (1989), New York's high court conducted a similar state-law analysis but reached a decision leaning in the opposite direction. In finding a zoning ordinance did not violate the freedom of expression guarantees of the state constitution, the court surprisingly chose the occasion to proclaim that "[s]tate courts are not bound by Supreme Court decisions defining Federal constitutional rights," and "New York may interpret its own Constitution to extend greater protection to its residents" (*Id.* at 556). The intent of the state high court to retain its authority to independently interpret the state constitution could not be more obvious.

[49] *See generally*, Galie, *supra* note 43. *See also*, Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 Publius, 141 (1986). (States with high courts that were reported as variously active in the 1970s and early 1980s in attempting to resolve rights cases on independent state constitutional grounds include, Alaska, Arizona, California, Colorado, New York, New Jersey, Oregon, Mississippi, Montana, Rhode Island, Utah, Vermont, Washington, and Wisconsin).

[50] This research suggests that in general, state courts showing a willingness to resolve rights cases independently under their state constitutions from the early 1970s through the mid-1980s have continued to do so. The following is a list of states indicating the number of cases in which various state high courts have cited as precedent the refined "independent and adequate state grounds" doctrine of Michigan v. Long, 463 U.S. 1032 (1983) in rights decisions from Jan. 1986 through Dec. 1991: Alaska, 3: Arizona, 7; California, 2; Colorado, 4; Connecticut, 11; Illinois, 3; Kansas, 1; Massachusetts, 1, Michigan, 6; Minnesota, 1; Mississippi, 11, New Hampshire, 20; New Jersey, 5; Mew Mexico, 1; New York, 10; North Carolina, 8; Oklahoma, 11; Pennsylvania, 3; South Carolina, 1; Texas, 7; Utah, 2; Vermont, 4; Washington, 4; Wisconsin, 1; Wyoming, 5.

[51] *See id.* States not identified in earlier national studies as generally active in resolving rights litigation under their state constitutions but exhibiting a marked willingness to do so in the past five years include Connecticut, Michigan, New Hampshire, North Carolina, Oklahoma and Texas.

State constitutional press theory and analysis also has emerged in the past five years in state high court defamation opinions.[52] Strictly speaking, the "new federalism" refers only to the most overt and influential form of independent state constitutional analysis: the practice of basing rights decisions on independent state constitutional grounds. However, a significant number of recent state high court defamation rulings that were not based exclusively on state constitutional grounds contain judicial discussion and consideration of theoretical implications arising from state constitutional protections for the press.

State high court evaluations concerning the range of protections for the press under state constitutions should be considered from within the larger judicial framework structuring most defamation analyses. Data collected for this study suggest that recent state high court defamation decisions can be rooted in one or more diverse bodies of law designed to regulate or protect expression: state common law and statutes, federal constitutional law, and state constitutional law. Not surprisingly, the initial determination as to whether a particular case should be decided on state constitutional grounds turns on the presence or absence of defamation issues which are not entirely preempted by federal constitutional law. But a more subjective factor—a state court's attitude toward independent constitutional interpretation—represents an even more crucial element of the equation. The decision to seek independent guidance from state constitutional provisions in defamation cases often boils down to a "state judiciary's opinion of what federal law *should be*."[53]

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[52] While they do not deal with defamation, cases involving the freedom of expression issue raised in Robbins v. Pruneyard Shopping Center, 447 U.S. 74 (1979) emerged over the course of this research. In ***Pruneyard***, the California Supreme Court ruled that under the free expression provision of the state constitution, citizens could exercise their expression rights in shopping centers. *See, e.g.*, Bock v. Westminster Mall Co., No. 90SC433, Supreme Court of Colo., (1991); SHAD Alliance v. Smith Haven Mall, 106 A.D.2d 189; 484 N.Y.S.2d 849 (1985).

Moreover, a number of technical or procedural factors can determine whether or not a state court chooses to read its constitution as more jealous of individual liberties than the minimum level of protections established by the federal judiciary's interpretations of the First Amendment.[54] The opening move often belongs to lawyers and litigants, who determine initially which common law, statutory[55] or constitutional issues are raised.[56] Libel defendants who rest their arguments exclusively on the First Amendment make it easier for state courts to ignore their own defamation laws and constitutional press provisions and consider only the federal layer of protection for freedom of expression.[57]

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[53] Bonham, *Note: Unenumerated Rights Clauses in State Constitutions*, 63 Texas L. Rev. 1321, 1331 (1985) (emphasis added).

[54] *See, e.g.*, Copple, *The Dynamics of Expression Under the State Constitutions*, 64 Journalism Quarterly 106. (Copple has suggested six factors to be considered when deciding whether or not to "deviate from established First Amendment doctrine": 1) institutional differences, 2) constitutional text, 3) state history and traditions, 4) federal occupation of the field, 5) other state interpretations, 6) national uniformity) *Id.* at 108.

[55] Retraction statutes, for example, have contributed to state diversity in defamation litigation. State courts have not fully endorsed the practice of warding off potential libel suits—or at least mitigating awards for damages—by publishing retractions. However, a majority of states currently have some kind of retraction law on the books.

[56] *See generally*, Durham, *Filling a Scholarly Void*, Natl. L. Jour., Sept. 29, 1986, Special Section: State Constitutional Law, at p. s-6.

[57] *See, e.g.*, Ex parte: Rudder v. Universal Communications Corp., 507 So. 2d 411 (Ala. 1987). (Defendants in a defamation action contended that the First Amendment, as interpreted by the U.S. Supreme Court, grants a newsgathering privilege that can be raised as a defense in an action for libel. Supreme Court of Alabama considered the arguments, rooted in federal law, that were presented by the defendants and found no such privilege implicit in the First

Defenses rested solely on state constitutional grounds are rare in modern defamation litigation as lawyers, versed primarily in *federal* freedom of expression law,[58] are almost sure raise federal constitutional arguments. In fact, the most common approach in the modern era has been to raise both federal and state constitutional provisions in actions for defamation,[59] leaving courts the option to delineate any discrepancies between the two levels of constitutional protection. And while often choosing to emphasize federal First Amendment considerations, state courts since the late 1920s "have shown a willingness to discuss whatever constitutional provisions, state or federal, are raised by litigants in their pleadings."[60]

In the defamation case of *Dombey v. Phoenix*,[61] for example, the Supreme Court of Arizona suggested it was bound to consider ". . . all issues, both factual and legal, which bear upon the constitutional privileges accorded by the first amendment and (the press clause) of the Arizona Constitution[62] unless the issues have been intentionally

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Amendment). *See also*, Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986). (The Supreme Court of Nebraska, observing that neither party raised state issues in this libel action, determined that "[t]his case is one of federal constitutional law, the analysis and outcome controlled by New York Times Co. v. Sullivan and its progeny." (*Id.* at 131).

[58] For discussion of the paucity of state law materials in law school texts, *see generally*, Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 Utah L. Rev. 326. *But see*, Durham, *supra* note 56. ("The scholarly void described by Professor Mazor now is beginning to be filled by astute judges and academics, and the time is coming when state constitutional decisions will be included in casebooks and treatises on 'American' constitutional law." *Id.* at p. s-6).

[59] *See generally*, Collins, *Looking to the States*, Natl. L. Jour., Sept. 29, 1986, Special Section: State Constitutional Law, at p. s-2. *See also*, *Freedom of Expression Under State Constitutions*, *supra* note 41.

[60] *Freedom of Expression Under State Constitutions*, *supra* note 41, at 326.

[61] 724 P.2d 562 (Ariz. 1986).

[62] Ariz. Const. art. 2 § 6.

and clearly waived by the parties."[63] The court indicated that this policy is necessary to insure that neither federal nor state levels of constitutionally protected expression would be inhibited. Similarly, *Wiemer v. Rankin* led the Supreme Court of Idaho to "explore the correct relationship between the law of defamation in Idaho and freedom of the press under the First Amendment."[64] In the majority of recent defamation cases reflecting joint state and federal constitutional evaluations, federal considerations ultimately emerged as the primary rationale for court rulings.[65] Courts are particularly cognizant of federal standards when the actual malice standard applies.

Other state judiciaries have performed joint constitutional evaluations and decided that the range of expression freedom granted individuals under state constitutional press provision(s) is equal to the degree of protection for expression currently available under the First Amendment.[66]

Some state high courts have indicated that federal and state constitutional protections might be equal in a specific area of press law but that a parallel constitutional interpretation might not be appropriate for all expression-related cases. In *Brown v. Kelly*

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[63] 724 P.2d 562, 568-69.

[64] 790 P.2d 347, 350-51 (Idaho 1990).

[65] *See, e.g.*, McCoy v. Hearst Corp., 727 P.2d 711 (Cal. 1986); True v. Ladner, 513 A.2d 257 (Maine 1986); Mittelman v. Witous, 552 N.E.2d 973 (Ill. 1989).

[66] *See, e.g.*, Gannett Co. v. State of Delaware, 571 A.2d 735 (1990). (In this case involving juror confidentiality, the Supreme Court of Delaware stated flatly that the state press clause "has the same scope as the federal first amendment." *Id.* at 740 n. 9). Art. 1, § 5 of the Delaware Constitution provides in part: "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty."

Broadcasting Co.,[67] for example, defendants in a defamation action contended that a private figure involved in a matter of public interest was required to show actual malice as a matter of policy under the California Constitution. The defense cited a number of previous cases in which California courts had indicated that "the California Constitution provides greater protection than its federal counterpart for freedom of speech and the press."[68] But the Supreme Court of California, noting that "[n]one of the cases relied on by defendants involved the proper standard of liability in a defamation action," dismissed the relevance of the defense's rationale, observing that "[w]e have recently applied the federal constitutional requirements without suggestion that our state Constitution creates higher obstacles to recovery for defamation."[69]

The court further reasoned that the "responsible for the abuse" phrase appearing in the press provision of the state constitution,[70] coupled with the absence of an equivalent textual proviso in the federal First Amendment, "refutes defendants' policy argument that our state Constitution weighs in favor of a standard of fault higher than that required under the federal Constitution."[71] While electing to construe its state constitution as parallel to the federal First Amendment in a defamation action, the California Supreme Court was able to leave intact earlier decisions—in other areas of freedom of expression—which interpreted the state press clause as more protective of expression rights than its federal counterpart.[72] The *Brown* case demonstrates a selective parallel interpretation approach which can be used by state courts to tailor the scope of various constitutional expression issues on a case-by-case basis.[73]

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[67] 48 Cal.3d 711 (1989).

[68] *Id.* at 745.

[69] *Id.* at 745-46. For another example of parallel state and federal press provision interpretation in a case concerning state-imposed fault standards for defamation *see*, Yetman v. English, 811 P.2d 323 (Ariz. 1991).

[70] Cal. Const. art 1, § 2, states in pertinent part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

[71] 48 Cal. 3d 711, 746 (1989).

A judicial approach emphasizing independent state law analysis has recently surfaced in defamation litigation at the state high court level. The trend "is undoubtedly fed by the increased awareness lawyers and litigants have today of state constitutions, by the law-review writings of respected jurists and other commentators, and by the activity of other courts."[74] In *Diesen v. Hessburg*, for example, the Minnesota Supreme Court's concluded that a plaintiff was unable to establish actual malice with convincing clarity in a defamation action brought by a public official.[75] The court's analysis of defamation law leading up to the decision was structured around a number of previous Minnesota cases, prompting the court justifiably to note that while First Amendment and other state policies were considered, "our decision here is rooted in state defamation law." [76]

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[72] *See, e.g.*, Robbins v. Pruneyard, 447 U.S. 74 (1979).

[73] *See also*, Harris v. Entertainment Systems, Inc., 386 S.E. 2d. 140 (Ga. 1989). (In this case, another example of selective parallel interpretation, the Supreme Court of Georgia grappled with constitutional questions surrounding the restriction of nude dancing and indicated that since "this court has never directly addressed the issues this appeal raises with regard to Georgia's protection of speech, we will apply the First Amendment standards." *Id.* at 141).

[74] Kaye, *Federalism's Other Tier*, 3 Constitution 48, 54 (1991).

[75] 455 N.W.2d 446 (Minn. 1990).

[76] *Id.* at 452. *See also*, Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow*, in THE FIRST AMENDMENT RECONSIDERED, 14-59 (B. Chamberlin & C. Brown eds., 1982). (The U.S. Supreme Court's 1964 *Sullivan*

Similarly, in *Locricchio v. Evening News Association*,[77] the Supreme Court of Michigan combined an analysis of state libel and constitutional law and concluded that defamation plaintiffs—in this case, private persons enmeshed in a matter of public interest—had not proven that statements in a series of newspaper articles were defamatory and false. The court examined three interlocking factors in accessing the plaintiffs' defamation claims: "the elements of libel under Michigan law, constitutional requirements and principles informing and attenuating Michigan libel law, and the contours of defamation as shaped by the two preceding factors."[78] Although the court's analysis was informed by the First Amendment, the majority stated that its decision was based on an examination of "the legal principles of libel law in Michigan."[79] The independent tenor of the ruling is studied and apparent.

Issues and Cases, 1986-1991

In the past five years, several state high courts have characterized their state press provisions as generally more jealous of press freedom than is required by federal constitutional law. In *Blatty v. New York Times Co.*,[80] for example, the California Supreme Court ruled that the omission of author William Peter Blatty's novel

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opinion "acknowledged that specific language and support for its decision to broaden the range of acceptable comment about public officials" came from earlier decisions in the state courts. *Id.* at 38).

[77] 438 Mich. 84 (1991).

[78] *Id.* at 115.

[79] *Id.*

[80] Blatty v. New York Times Co., 42 Cal. 3d 1033 (1986).

Legion from a weekly list of best selling books would not support an actionable claim of injurious falsehood. The *Times* argued that such a complaint was barred under both federal and state constitutional law.[81] The California high court agreed, stating that while "the First Amendment establishes a broad zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood . . . . Article I, section 2, of the California Constitution,[82] our state constitutional guarantee of freedom of expression and of the press, independently establishes a zone of protection that is broader still."[83] The majority appended to its analysis the following explanation: "Throughout this opinion we have used 'First Amendment' to refer not only to that provision of the United States Constitution, but also to article I, section 2, of the California Constitution. It is the latter on which we primarily rely."[84]

The California Supreme Court's clear statement that its ruling rested on state constitutional grounds is significant. State court decisions based independently on state constitutional law have become more common in individual rights litigation,[85] and the autonomy of state judiciaries in interpreting their own constitutions was fortified in 1983 with the refinement of the "independent and adequate state grounds" doctrine in *Michigan v. Long*.[86] The U.S. Supreme Court in *Long* confirmed the idea that when a state court clearly and justifiably specifies an independent state-law basis for a decision, federal review is precluded. The Court held that when a state court opinion includes a "plain statement" indicating that the ruling is properly based on bona fide separate, adequate, and independent state grounds, the decision will be shielded from federal review.[87] State high courts have cited the independent state grounds doctrine of *Long* in more than 125 decisions since 1985.[88]

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[81] *Id.* at 1039.

[82] Cal. Const. art. I, sec. 2. (Quoted *supra* at note 70).

[83] 42 Cal.3d 1039, 1041. *See also,* Casso v. Brand, 776 S.W.2d 551 (Tex. 1989). (In this defamation action, the Supreme Court of Texas stated that ". . . we have recently recognized the possibility that our state free speech guarantee may be broader than the corresponding federal guarantee." (*Id.* at 556).

[84] 42 Cal. 3d 1039, 1049 at n. 4.

[85] *See*, Collins, Galie & Kincaid, *supra* note 49. (State high court judges and justices in survey report that rights affirming decisions by state high courts increased 131 percent in the period 1977-1986 over the period 1950-1977). *See also*, Brennan, *supra* note 18. ("Between 1970 and 1984, state courts have handed down over 250 published opinions holding that the constitutional minimums set by the U. S. Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law." *Id.* at 548).

A 1991 defamation ruling of the New York Court of Appeals is perhaps the most vivid example to date of a state high court exercising independent state constitutional analysis to foster a local climate of press freedom extending beyond the minimum levels required under federal law.[89] The majority opinion in *Immuno v. Moor-Jankowski* contains a general endorsement for state control over matters of free expression and an eloquent treatise on the "exceptional history and rich tradition"[90] of liberty of the press under art. VII, § 8 of the New York Constitution.[91] The court further indicated that the words of this provision, unchanged since its adoption in 1821, "reflect the deliberate choice of the New York State Constitutional Convention not to follow the [proscriptive] language of the First Amendment . . . but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms.[92] The case was resolved in favor of the defendant editor of a scientific journal. The intent of the *Immuno* majority to shield its decision from federal review is evident from the plain statement that "we decide this case on the basis of state law independently, and that our state law analysis reference to Federal cases is for the purpose of guidance only, not because it compels the results we reach."[93]

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[86] 463 U.S. 1032 (1983).

[87] 463 U.S. 1032, 1041. (O'Connor, J., delivered the majority opinion joined by Burger, C.J., White, Powell, and Rehnquist, JJ.). *But see*, Bonham, *supra* note 53. (Bonham notes that *Long* actually represented a reversal of the U.S. Supreme Court's tradition "of deferring to state law whenever it was possible that the state court opinion rested on state law. *Long* created an opposite presumption: federal review is possible unless the case clearly poses *no* federal issue." (*Id.* at 1337-38) (emphasis in original).

[88] *See. e.g.*, State of Arizona v. Powers, 742 P.2d 792 (1987); Sands v. Morongo Unified School District, 809 P.2d 809 (1991); State of Connecticut v. Edwards, 570 A.2d 193 (1990).

[89] Immuno v. Moor-Jankowski, 567 N.E.2d 1270 (1991).

[90] *Id.* at 1277.

But a state court's suggestion that a decision rests on independent state grounds does not completely insure that the federal judiciary will not get involved. In rationalizing its decision to review the case of *Milkovich v. The Times Herald*,[94] for example, the U.S. Supreme Court rejected the contention that an opinion handed down by the Ohio Court of Appeals contained a statement which precluded federal scrutiny under *Michigan v. Long*. The Supreme Court indicated that the case appeared to raise federal constitutional questions and dismissed as insufficiently plain the Ohio Court's statement that its ruling was based on independent and adequate state grounds.[95] After justifying its authority to exercise judicial review in this case, the Court reversed the state court's finding for a media defendant and remanded the case for further proceedings. Significantly, however, and immediately after commenting on the shortcomings of the lower court's independent state law analysis, the U.S. Supreme Court noted that its Ohio counterpart is free to address the issue of federal review on remand.[96] This could be read as an invitation for the Supreme Court of Ohio to more effectively block federal review of future decisions with plain statements indicating a reliance on bona fide independent and adequate state grounds.

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[91] Art. VII, § 8, of the 1821 Constitution of New York reads:
"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

[92] 567 N.E.2d 1270, 1277.

[93] *Id.* at 1278. On June 3, 1991, the U.S. Supreme Court refused to review the *Immuno* decision, apparently endorsing the New York Court of Appeals' contention that the ruling was properly grounded in state constitutional law and not open to federal review. (No. 90-1579), *cert. denied.*

[94] Milkovich v. The Times Herald, 46 Ohio App. 3d 20 (1989).

U.S. Supreme Court decisions notwithstanding, two particularly nebulous issues involving the nature of speech have led to independent state constitutional analysis in recent state high court opinions. One major area of ambiguity and state court interpretation concerns the level of protection for non-public libel plaintiffs embroiled in matters of public concern. The other unsettled issue involves the scope of constitutional protection for opinion.

Several state high court defamation decisions in the past five years have centered on levels of state constitutional protection for speech involving matters of public concern, despite some limited guidance on this issue from the U.S. Supreme Court.[97] A few state judiciaries have rejected outright the negligence standard in cases where the subject matter is of public concern and instead "require a showing of actual malice by clear and convincing evidence . . . regardless of the status of the defamed plaintiff."[98]

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[95] Milkovich v. Lorain Journal Co., 110 S.Ct. 2695, 2701-02 n. 5 (1990).
[96] *Id.*

Other state courts have tried to develop a level of fault somewhere between simple negligence and actual malice that is sometimes referred to as "gross negligence." New York, for example, has determined that the simple negligence standard is too restrictive when the content of a potentially defamatory article is "within the sphere of legitimate public concern."[99] In such cases, even a private plaintiff must establish by a preponderance of the evidence that the defendant acted in a grossly irresponsible manner and without due consideration for responsible standards of information gathering and dissemination.

In *Lansdowne v. Beacon Journal*,[100] the Supreme Court of Ohio considered a non-public plaintiff's claim of defamation arising from a newspaper article detailing problems at a state-regulated harness racing track. The court ruled that private plaintiffs involved in issues of public concern must prove "by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication" to collect compensatory damages.[101] After determining that federal constitutional law was not preemptive in this private figure defamation case, the Ohio court fixed the new standard as a matter of state constitutional law.[102] The court explained that "First Amendment freedoms under the federal Constitution are independently reinforced in Section 11, Article I, of the Ohio Constitution."[103] With its decision, the Supreme Court of Ohio endorsed a state constitutional standard for press freedom extending beyond the minimal levels of protection required under federal constitutional law.

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[97] *See*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). In *Rosenbloom*, a three-member U.S. Supreme Court plurality declared that the *Sullivan* actual malice standard should apply to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous" (*Id.* at 44). But three years later in *Gertz*, a restructured Court retreated from this position and limited application of the actual malice standard to public officials and public figures. The states were left to set the standard of fault in all other defamation cases.

[98] Lansdowne v. Beacon Journal, 32 Ohio St.3d 176, at 188 (1987). Other states which have endorsed this standard include: Colorado (Diversified Mgmt., Inc. v. Denver Post, Inc. 653 P.2d 1103 (Colo. 1982); Indiana (Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. 1974); Michigan (Dienes v. Associated Newspapers, Inc., 358 N.W.2d 562 (Mich. 1984).

[99] *See, e.g.*, Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569 (1975).

[100] 32 Ohio St. 3d 176 (1987).

In *Sisler v. Gannett Co., Inc.*,[104] the Supreme Court of New Jersey decided that the common law fair comment privilege required a private person defamation plaintiff, voluntarily involved in a matter of public concern, to demonstrate actual malice.[105] But it is apparent that a judicial analysis concerning the nature of New Jersey's state constitutional protection for speech on matters of public concern offered persuasive theoretical support for the ruling.[106] The court cited a line of previous decisions, "pronounced in the benevolent light of New Jersey's constitutional commitment to free speech, [which] have stressed the vigor with which New Jersey fosters and nurtures speech on matters of public concern."[107] According to a court majority, the state press clause, "more sweeping in scope than the language of the First Amendment, has supported broader speech rights than its federal counterpart."[108]

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[101] *Id.* at 180. (The standard of fault established by the Ohio Supreme Court—clear and convincing evidence of negligence—represents a more demanding fault requirement for proving negligence than the ordinary preponderance of the evidence, which was the minimum level of protection for expression required under *Gertz*.)

[102] *Id.* at 181.

[103] *Id.* at 178.

[104] 104 N.J. 256 (1986).

[105] *Id.* at 279.

The public concern rationale has encouraged independent state constitutional analysis in defamation actions brought by public figures as well. In *Ruebke v. Globe Communications*,[109] the Supreme Court of Kansas determined that a trial court's summary judgment had been properly granted for a media defendant who had established the truth of the matter charged as defamatory. The plaintiff—who was found guilty of a triple murder while the libel action was pending—was classified as a limited purpose public figure and was thus required to show actual malice. The court considered the multiple murder a public controversy and ruled that the murder conviction was convincing evidence that statements about the defendant which appeared in a *Startling Detective* magazine story were indeed true. The court opinion cited the state constitution's press provision which provides that ". . . if it shall appear that the allegedly libelous matter was published for justifiable ends and is truthful, the accused party shall be acquitted."[110] According to the Supreme Court of Kansas, all of the article's allegations that Ruebke had committed the crimes were true, and the contested statements were protected expression under the state constitution.[111] Therefore, the court decided, summary judgment for the media defendant had been properly granted.

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[106] N.J. Const. Article I, para. 6, states in pertinent part: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

[107] 104 N.J. 256, at 271-72.

[108] *Id.* at 271.

[109] 738 P.2d 1246 (1987).

Another unstable issue in modern defamation law involves differing levels of constitutional protection for statements of fact and statements of opinion and the problem of distinguishing between these two forms of expression. A recent Supreme Court decision, while attempting to resolve confusion concerning the degree of protection for published opinion, has left an open door for further independent state development and interpretation of defamation law.[112]

In 1974, Justice Powell's dicta in *Gertz* emphasized a need to determine if potentially libelous material represents assertions of fact or opinion.[113] In subsequent years the Court provided only limited guidance on this issue. Consequently, "a great many judges and lawyers took (the *Gertz* dicta) to mean that statements of opinion cannot be used as the basis for a successful libel suit."[114] The lower federal courts and state courts responded to Justice Powell's statements by fashioning a variety of approaches designed to distinguish between fact and opinion.[115] These judicial efforts prompted U.S. Supreme Court Justice Rehnquist to complain in 1985 that that lower courts had seized upon the word "opinion" in *Gertz* to "solve with a meat axe a very subtle and difficult question, totally oblivious 'of the rich and complex history of the struggle of the common law to deal with this problem.'"[116]

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[110] Kan. Const. Bill of Rights @ 11.

[111] Truthful statements also are protected under federal law. The Supreme Court of Kansas deliberately elected to ground its ruling in state constitutional law.

[112] Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990).

[113] 418 U.S. 323 (1974). ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Id.* at 339-40).

But with its 1990 ruling in *Milkovich v. Lorain Journal Co.*, a Supreme Court majority decided that the passage in *Gertz* "was not intended to create a wholesale defamation exemption for anything that might be labelled 'opinion.'"[117] And while the Court did attempt to distinguish between protected and unprotected opinion,[118] the "impact of this decision remains, in large part, in the hands of the lower courts."[119] Specific federal guidance on this issue remains limited, and the state courts shoulder much of the responsibility for developing or adopting tests to determine if defamatory comments that seem to be opinion contain assertions of objective fact. But following *Milkovich*, one thing is certain: the determination as to whether a statement which appears to be opinion can reasonably be assigned a defamatory meaning has become a pivotal constitutional question.[120] And the way things stand, state courts are authorized to interpret their own constitutional provisions to provide greater protection for freedom of expression—including statements of opinion—than is required under the murky federal standards governing this unsettled area of defamation law.

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[114] Pember, *supra* note 48, at 9.

[115] *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 977 (D.C. Cir. en banc 1984), cert. denied 471 U.S. 1127 (1985). (An influential four-part test for distinguishing fact from opinion emerged from the *Ollman* case).

[116] 750 F.2d 970, at 977 (D.C. Cir. en banc 1984), cert. denied 471 U.S. 1127, 1129 (1985) (Rehnquist, J. dissenting).

[117] 110 S.Ct. 2695, 2705. (Opinion by Rehnquist, C.J., Brennan and Marshall, JJ dissenting).

[118] *See id.* at 2704-08. (Under *Milkovich*, expressions of "opinion" which imply an assertion of objective fact may be actionable.).

[119] Pember, *supra* note 48, at 10.

In *Scott v. The News-Herald*,[121] for instance, the Supreme Court of Ohio attempted to distinguish between fact and opinion in considering whether summary judgment for a media defendant had been properly granted. The case sprang from a column appearing on the sports page of a newspaper which implied that the plaintiff, a public school official, had lied under oath in a court of law. The Ohio court found the article "to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press."[122]

State constitutional protection for opinion also was an issue in *Diesen v. Hessburg*,[123] a 1990 defamation action brought by a public official against a media defendant. The case centered on three articles concerning battered women—published in the *Duluth News-Tribune*—which criticized the county attorney's job performance in prosecuting domestic abuse. After determining that the articles contained only true statements and statements of opinion, the Supreme Court of Minnesota, indicated that any implications arising from the articles represented constitutionally protected criticism of a public official.[124] And although it paid homage to "first amendment and other policy considerations," the high court of Minnesota rooted its decision in state defamation law.[125]

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[120] *See*, 110 S.Ct. 2695, 2704-06.

[121] 25 Ohio St. 3d 243 (1986).

[122] *Id.* at 244.

[123] 455 N.W.2d 446 (Minn. 1990).

The *Immuno*[126] decision of the New York Court of Appeals also considered the level of state constitutional protection for opinion. This libel action was prompted by a letter to the editor published in the *Journal of Medical Primatology.* The letter was critical of a corporation's plan to conduct hepatitis research using chimpanzees. New York's highest court concluded that statements in the letter which could have been characterized as opinion were "seriously" presented and that "it would be plain to the reasonable reader that [the author] was voicing no more than a highly partisan point of view.[127] Since the plaintiff did not prove the falsity of the statements, the court—basing its decision on independent state constitutional grounds—upheld the defendant's motion for summary judgment. The majority opinion called state constitutional review "a a responsibility of state courts and a strength of our Federal system."[128] The majority also noted the lack of clear federal guidance concerning the proper scope of protection for opinion and warned that "insufficient protection may be accorded to central values protected by the law of this State" if unsettled areas of federal defamation law—such as the opinion privilege—are construed narrowly.[129]

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[124] *Id.* at 452.
[125] *Id.*
[126] 567 N.E.2d 1270 (1991).
[127] *Id.* at 1281.
[128] *Id.* at 1279.

Barring additional direction from the U.S. Supreme Court, state constitutional press provisions may be interpreted to encompass a wider range of protection for opinion than is currently recognized under federal law.[130] Such interpretations are a distinct possibility in state courts which already have read their constitutions as providing a broader range of protection for speech and press than the minimum required by the Federal Constitution.

Conclusion

This study suggests that independent state constitutional analysis is most likely to surface when a defamation case raises an issue not preemptively controlled or settled by federal constitutional law. In addition, a state judiciary must have judges 1) who are willing to consider independently the scope of their state constitution's protection for the press and 2) who consider a particular area of federal defamation law unsatisfactory. This study further suggests that if enough members of a state high court share these attitudes, they can exercise their authority and autonomy within the system of federalism and establish constitutional protection for defamation defendants above the minimum levels established by U.S. Supreme Court interpretations of the First Amendment. Moreover, these decisions can be insulated from federal review with plain statements indicating that they are based on bona fide adequate and independent state grounds.

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[129] *Id.* at 1278.

[130] *See, News Notes: PLI Seminar Considers Effect of Milkovich Ruling*, 18 Med. L. Rptr. No. 10 (Dec. 4, 1991). (According to Robert D. Sack, of Gibson, Dunn & Crutcher, New York, one result of *Milkovich* might be a return to state constitutions to find privilege for opinion. Sack stated that the common law defense of fair comment might properly be raised in some cases, but that "[w]e are still in the constitutional thicket, and will find our protection there." *Id.*).

A number of additional, related factors can and do contribute to state diversity and independent state analysis in defamation litigation. These include: the ambiguous language and opportunities for state interpretation present in federal defamation law; the system of federalism itself, which provides a double layer of constitutional protection for the rights of citizens; increased judicial authority resulting from the constitutionalization of libel law; the obvious textual differences between the First Amendment and the various state constitutional press clauses; and the vast body of existing state case law in press-related areas—the result of state jurisdiction over expression freedoms throughout most of modern American history.

Two significant observations arising from the research for this study indicate that state court diversity and autonomy is highly visible in several areas of press law, and that independent state constitutional analysis appears to be expanding rapidly in defamation law. Almost all defamation cases examined in this study that included an independent assessment of state constitutional protection for the press were resolved with decisions favoring media defendants.

Although certain state courts appear content to accept federal guidance and continue eschewing the new federalism approach, other state courts "repeatedly have broken ranks with the U.S. Supreme Court"[131] and attempted to establish higher levels of protection for expression rights under state law. As a result of the renewed interest in state constitutions, state high courts are becoming more adept at fashioning independent analyses and in reaching decisions based on state constitutional provisions and other state laws. It would seem, as Justice Brennan has said, that the state court laboratories are indeed "open for business" once again[132] and that press law in general, and defamation law in particular, is an increasingly popular subject for experimentation.

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[131] Collins, Galie & Kincaid, *supra* note 49, at 151.
[132] Brennan, *supra* note 18, at 551.

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(Don't) Express Yourself: Can State Constitutions Protect Freedom of Speech and the Press During the Rehnquist Years? A 50-State Survey of Free Speech Provisions And a Digest of Selected States and How They Might Fare

> *The U.S. Supreme Court is no longer the conscience of the nation. It has passed that awesome responsibility to fifty unsuspecting state courts. Some are delighted, others bemused. Some may decline the responsibility while others will be slow to accept. It is no small task to be conscience, seer, and grand interpreter. It is much easier to be a mime.*[1]

The Supreme Court of the United States is changing. As new associate justices such as Clarence Thomas[2] and David H. Souter[3] have taken their places on the high court, individual rights advocates have lost two judicial heroes, Justices William J. Brennan, Jr., and Thurgood Marshall.[4]

What does this mean for the media, for freedom of speech and of the press?

A judicial hint may have been dropped in the summer of 1990 when the Supreme Court decided Milkovich v. Lorain Journal Co., a libel case centering on the fact/opinion distinction.[5] Chief Justice Rehnquist's majority opinion in Milkovich held that there was no need for a separate constitutional privilege for opinion in defamation cases in addition to "existing constitutional doctrine"[6] The Court also held that both state and federal lower courts had held "a mistaken reliance on" Justice Powell's "no false idea" dictum in the 1974 decision in Gertz v. Robert Welch, Inc.[7] and that "a reasonable factfinder could conclude that the statements in the [sports column] implied an assertion that petitioner [Michael] Milkovich perjured himself in a judicial proceeding."[8] This could be verified through Milkovich's recorded testimony and was, therefore, fact rather than opinion.[9] This decision disavowed the First Amendment-based absolute privilege for opinion used frequently prior to that by many lower courts.[10]

Most courts after Milkovich followed the high court's instructions and have used either the state common law "fair comment" privilege for opinion[11] or court-established First Amendment protections for media speech, such as the New York Times Co. v. Sullivan "actual malice" standard of proof[12] or the "rhetorical hyperbole' defense established in Greenbelt Cooperative Publishing Assn. v. Bresler[13] and Letter Carriers v. Austin.[14]

One notable state high court did not rely on state common law or federal constitutional protections. Instead, it used its state constitution's free speech and press provision to protect opinion to a greater degree than the First Amendment would have. It also successfully avoided U.S. Supreme Court review because only state law was used to protect opinion. Enter modern federalism in libel law.

The case was Immuno A.G. v. Moor-Jankowski[15] and the court was New York State's highest court, the Court of Appeals. Because the Immuno method of using the state constitution to protect a media libel defendant was successful where others had failed,[16] this case can be used as a model for a successful state law defense in libel cases in New York and many other states.[17] Selected states will be discussed as to whether their speech/press clauses, case law and history and tradition can support an Immuno-type defense to protect the media during a time of growing conservatism on the Supreme Court.[18] This alternative approach to the protection of free speech and the press is not meant to totally supplant the use of First Amendment protections, but does add another source for such protection if the media defendant fears that bringing the case to the federal high court in the 1990's may create a narrowing of federal constitutional protections for speech[19] -- putting one's head into the lion's mouth and asking not to be bitten. It also may rejuvenate or, in some cases, create a fresh field for modern federalism -- in libel law.

This article will examine the Immuno method and will discuss why this case succeeded where many others had failed when using state constitutional law. It will conclude that the method may be worth trying in many states, using Immuno as supportive, comparative law, and that many states may succeed in using this option. Nevertheless, it will take courageous defendants, defense counsel and state jurists to create a modern federalism movement in libel law.

The 50-state survey in Appendix A of some interpretive (textual) analysis elements[20] of free speech provisions and their history shows that 44 states have texts that differ noticeably from the First Amendment text.[21] Twenty-six states have affirmative as well as prohibitive language; 18 have only affirmative language; and just 6 have First Amendment-like prohibitive language only. More than half of the state constitutions were written before the First Amendment was applied to the states in Gitlow v. New York[22] in 1925, giving historical support to the states' claims of a long-standing protection of freedom of speech and of the press. Most of the states place their Bills of Rights or Declarations of Rights at the beginning of their constitutions, rather than as amendments at the end -- usually in articles 1 or 2 or as prefatory material.[23] Thirty-three of the state speech provisions evidence a strong desire to protect speech and the press through using two or more supportive statements or very strong wording to emphasize the importance of these rights.[24] No state gives less than moderate, one-statement support to speech.[25]

The selected states digest discusses some non-interpretive analysis elements such as case law and state history and traditions -- the macro-issues. It reveals that the states do not all fall into lockstep with federal First Amendment interpretation. New York and California, for example, often march to a different drummer.[26]

The "New Federalism" of the 1970's and 1980's Becomes Modern Federalism in Libel Law

> ***Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.***[27]

The Supreme Court of the United States has always been a major factor in the development of the no-longer-new "new federalism" movement. The beginning came in the court's 1925 decision in Gitlow v. New York, which held that the due process clause of the Fourteenth Amendment applies the First Amendment to the states.[28]

In 1964, the Supreme Court in New York Times Co. v. Sullivan,[29] first entered the libel arena by creating a First Amendment-based defense for libelous statements made by the media about public officials -- the "actual malice" standard or privilege.[30] Since that time, state libel law has been further infringed upon by the Court by providing other federal constitutional defenses for the media.[31]

These protections have waxed and waned in degree as the philosophies of the Court have changed with the appointment of new chief justices and associate justices.

Judge Vito Titone of the New York Court of Appeals, who wrote a concurring opinion in the 1991 Immuno A.G. v. Moor-Jankowski decision,[32] wrote in 1987:

> I would be less than candid if I failed to acknowledge that the transition from the Warren Court to the Burger-Rehnquist Courts, with the attendant shift in the Supreme Court's philosophy, is perhaps the single most important factor behind the heightened attention to state constitutions. As Justice Brennan has contended, federal solicitude in the areas of personal freedom, liberty and other 'guarantees' arising under the Bill of Rights has diminished since the years of the Warren Court. This change in philosophy has given litigants and civil libertarians a powerful incentive to bring their grievances to our state courts and present their claims in terms of state constitutional issues. Additionally, it has motivated the highest courts of some states to take an active role in extending to state citizens greater protections than the federal Constitution has been deemed to afford. The result has been an emerging perception that state courts are a more hospitable forum than are their federal counterparts for those who seek expanded protection of human rights and civil liberties. Interestingly, this perception represents a dramatic turnabout from that which prevailed during the Warren Court years, when the federal courts were seen as the bulwark standing between citizens and state governmental incursions on their liberties.[33]

In the post-Milkovich v. Lorain Journal Co.[34] era of the 1990's, as Justices Brennan and Marshall retire from the Supreme Court and new appointments are made such as those of David H. Souter and Clarence Thomas, the leading protectors of First Amendment rights are being replaced by Bush nominees whose judicial opinions are expected to vary by quantum leaps from those of the departing Justices. The fact that Roe v. Wade[35] was weakened greatly if not effectively overturned in the abortion rights arena[36] and the denial of the existence of a specific First Amendment opinion privilege in Milkovich only underscore the potential dangers of diminishment of federal protection for individual rights.

The Court's decision in Masson v. The New Yorker Magazine, Inc.[37] was awaited with trepidation as the media feared that the "fabricated quotation" case would lead to a narrowing of the media's ability to quote subjects without an increase in libel claims based on inaccuracies in published quotations.[38]

With this as background, the future of First Amendment decisions that will continue to protect the media rather than constrict their freedoms are in question.

The scene, then, is set for the increased and more effective use of media affirmative defense grounds based on state constitution free speech/press provisions. Thus, the media can sidestep U.S. Supreme Court review and enhance, rather than diminish, the rights of media libel defendants -- modern federalism in action.

This is the newest territory for applying the principles of the 1970's- and 1980's-era "new federalism" movement.[39] It was used mainly in sometimes unsuccessful attempts to protect criminal defendants,[40] and, to a lesser degree, to protect political activists at privately owned shopping malls,[41] or reporters wanting access to trials[42] as the Burger Court constricted individual rights under state constitutions by holding that more restrictive federal constitutional law applied, despite defense attempts to use more liberal state constitutional protections.[43]

Michigan v. Long Shows How to Frame an Adequate and Independent State Constitutional Defense

The seminal decision most relevant to modern federalism is Michigan v. Long.[44] In Long, the Supreme Court held that it would not review state law cases if they were decided on adequate and independent state grounds. However, what Long really did was narrow the window of opportunity for use of state grounds, making it imperative that the state constitutional defense be worded as prescribed by Justice O'Connor in her majority opinion.

The Long decision held that if the wording of the defense's intention to use independent state grounds was unclear, the defendant could lose the state defense by default to any federal grounds also presented in the case.[45] Second, in determining whether state court references to state law constitute adequate and independent state grounds, the Court "will no longer look beyond the opinion under review, or require state courts to reconsider cases to clarify the grounds of their decisions, as had been done in the past."[46] In other words, the defendant does not get a second chance to explain the state grounds.

The avoidance-of-federal-review benefit that defendants can derive from the use of state law defense grounds is based on a jurisdictional issue. As Justice O'Connor said in Long:

> The principle that we will not review judgments of state courts that rest on adequate and independent state grounds is based, in part, on "the limitations of our own jurisdiction." The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."[47]

As will be discussed later, the Immuno case, after a remand to the New York Court of Appeals to decide the case in light of Milkovich, was again challenged by plaintiff Immuno after the state high court decided for the defendant. This time, the U.S. Supreme Court denied certiorari because the state grounds used in the New York court's second hearing of the appeal were apparently sufficiently well executed per Long. Thus, the U.S. Supreme Court had no jurisdiction.[48]

Justice O'Connor also held in Long:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . 'It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal Constitution of state action.'[49]

The decades-old warning in Minnesota v. National Tea Co.[50] about the dangers of ambiguous or obscure state court decisions have not been heeded by many lower courts, with Long as a prime example. What did the Long court do wrong? Justice O 'Connor explained:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its

judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[51]

In Long, the Court held that the state case was not decided using adequate and independent state grounds[52] because it "appears to us that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568, 97 S.Ct. 2849, 2854 . . . (1977)."[53]

Thus, Long lost his appeal in a criminal case and, on the same basis, Scripps-Howard lost its appeal in a free press/right of privacy case. In Zacchini, the Ohio Supreme Court held that the broadcasting company claimed that it was constitutionally privileged to include matters of public interest in its newscasts -- in this case, Hugo Zacchini's "human cannonball" act -- which was protected by Ohio's "right of publicity" law. This protects the performer from economic loss through unapproved free display of the performance that deprives the artist of an economic incentive to make the investment required to produce the performance of interest to the public.[54]

The federal Court reversed the Ohio decision because it had primarily relied on two U.S. Supreme Court cases construing the First Amendment,[55] Time, Inc. v. Hill[56] and New York Times Co. v. Sullivan[57].

In summary, when using state constitutional law to protect a defendant, the state court should make clear that:

1. the court is basing its decision on state law only and that First Amendment protections do not compel the result,

2. that the state grounds are not ambiguous or obscure,

3. and that any references to federal case precedents are for guidance and do not compel the state law to be interpreted in a certain way -- by a "plain statement" in the opinion.

It would appear that citing federal cases, even for "guidance," may be a risky business for media defendants.[58] If the state law requires a different result from that of First

Amendment law, why would federal cases be relevant? Why not use another state's method, such as that in the Immuno case if necessary due to lack of state precedents in the state in question? Finally, the state court is free to interpret its own constitution as it sees fit -- even in a groundbreaking move toward modern federalism.[59]

Immuno A.G. v. Moor-Jankowski: A Model for the Media Defendant

> *The expansive language of our State Constitution guarantee . . . , its formulations and adoption prior to the Supreme Court's application of the First Amendment to the States *** the recognition in very early New York history of a constitutionally guaranteed liberty of the press *** and the consistent tradition in this State of providing the broadest possible protection to "the sensitive role of gathering and disseminating news of public events" *** all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference.*[60]

In Immuno A.G. v. Moor-Jankowski,[61] New York's highest court, the state Court of Appeals, followed the strictures of Justice O'Connor in Michigan v. Long.[62] Its reward for its efforts was that the U.S. Supreme Court denied certiorari when plaintiff Immuno appealed to the Court a second time,[63] claiming that the use of independent state constitutional grounds was not proper. The appeal's denial put an end to the case at last and gave the media a successful model for future libel claims.

What did the Court of Appeals do that others had not done in previous attempts to use state constitutional protection in libel cases after the 1983 Long decision? One failed attempt was related closely to the Milkovich v. Lorain Journal Co.[64] decision, and was mentioned in a footnote in the case.[65]

In 1986, the Ohio Supreme Court decided Scott v. News-Herald.[66] This was the companion case to Milkovich, in which Maple Heights Public Schools Superintendent H. Donald Scott separately sued the same sports columnist, J. Theodore Diadiun of the News-Herald, for writing in a 1974 sports column that Scott and Maple Heights wrestling coach Michael Milkovich, Jr., were liars at two judicial hearings after a wrestling match altercation.

The state high court in Scott held that under the Ohio Constitution, the media defendant has absolute immunity from liability for statements of opinion in defamation claims.[67] The Ohio court adopted Judge Starr's four-factor "totality of the circumstances" test from Ollman v. Evans,[68] the 1984 federal District Court case that quantified the fact/opinion analysis and created a near bright-line test in this uncertain area of defamation law.

The Supreme Court in Milkovich discussed the Scott state constitutional defense in footnote 5:

> [R]espondents concede that the Scott court relied on both the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege. . . . but argue that certain statements made by the court evidenced an intent to independently rest the decision on state law grounds, thereby precluding federal review under Michigan v. Long, . . . We simlarly reject this contention. . . . Scott relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants. . . , and concluded that "based upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution."[69]

The Milkovich Court then concluded that the Scott decision was at least interwoven with federal law and that the decision did not clearly rest on independent state grounds. In addition, Scott did not make a plain statement that the federal cases did not compel the result that the court reached. This reiteration of the Long adequate and independent state grounds method[70] that would pass muster only reaffirms the need for the media defendant to take these requirements quite literally -- or innocent dictum about federal law could destroy its state constitutional defense.[71]

This illustrates why Immuno is so important as a model for such a defense. What did the defendant claim in the New York case? And how was it done to avoid Supreme Court review in 1991?

The Immuno Method

The New York Court of Appeals opinion in Immuno A.G. v. Moor-Jankowski[72] was written by Judge Judith S. Kaye, who is a proponent of the use of the state constitution to protect its citizens. Kaye wrote in 1987 that although the U.S. Supreme Court's constitutional rulings set minimum standards below which the states cannot go when giving protection to their citizens, that in the past "the federal guarantees as then interpreted by the Supreme Court in general not only satisfied but often exceeded their view of the requirements of comparable state provisions."[73] But, she cautioned, it is when the Supreme Court reformulates this federal floor that it "cannot help but bring the rest of the structure into question."[74] She agreed that Michigan v. Long[75] is "a most significant development" and stated that despite its narrowing of the boundaries within which a state may use adequate and independent state grounds, Long has "staked out the state courts' sphere of autonomy, and it has given the state courts the ability to assure that they remain the ultimate arbiters of state law decisions."[76]

In Immuno, Judge Kaye first divided the challenged statements into two categories: those that were factual and could be proved true or false, and those that were opinion and thus not verifiable.[77] The statements were in a letter to the editor written by Dr. Shirley McGreal, a scientist and an animal rights activist. It was published in the Journal of Medical Primatology in December 1983. McGreal was chairperson of an animal advocacy group concerned with the use of primates for biomedical research. The defendant was Dr. Jan Moor-Jankowski, a professor of medical research at New York University School of Medicine and a co-founder and editor of the scientific journal.[78]

McGreal's letter stated that Immuno A.G., a multinational corporation based in Austria that manufactures biologic products, had a plan to establish a facility in West Africa for hepatitis research using chimpanzees, an endangered species. McGreal criticized Immuno's plan as a way to avoid international policies or legal restrictions on the importation of chimpanzees and that even if the test animals could be returned to the wild, they might spread hepatitis to the rest of the chimpanzee population.[79]

The letter was prefaced by an editorial note written by the defendant that stated that the journal had submitted McGreal's letter to Immuno for comment or reply. The plaintiff informed Moor-Jankowski that it was referring the matter to its New York lawyers, who wrote later to the editor that the statements were inaccurate and threatened legal action if the letter were printed before Immuno had "meaningful" time to reply.[80]

The editor waited almost a year before printing the letter after having received no further word from the plaintiff or its lawyers. Immuno then sued Moor-Jankowski, McGreal and six other defendants. The New York Court of Appeals heard the case for a second time in January of 1991, after all of the defendants except the editor had settled with Immuno for "substantial sums."[81] This is the decision that contains the "Immuno method" model.[82] It is relevant today because it came after Milkovich and is up-to-date in its reflection of Supreme Court press law decisions relating to the fact/opinion distinction in libel law.

Judge Kaye wrote in her 1991 Immuno opinion: "Our analysis first focuses on Milkovich, in compliance with the Supreme Court's direction on remand. . . . The key inquiry is whether the challenged expression, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact."[83] Judge Kaye wrote that the critical difference was that the Milkovich Court reduced the four-factor Ollman v. Evans[84] opinion test to a single "type of speech" test:

> "Moreover, the Court made clear that by protected type of speech it had in mind the rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression found in Hustler Magazine v. Falwell, . . . 108 S.Ct. 876 . . . [ad parody]; Letter Carriers v. Austin, . . . 94 S.Ct. 2770 . . . [labor dispute], and Greenbelt Publ. Assn. v. Bresler, . . . 90 S.Ct. 1537, . . . [heated real estate negotiation] -- all instances where the Court had determined that the imprecise language and unusual setting would signal the reasonable observer that no actual facts were being conveyed about an individual."[85]

The Supreme Court in Milkovich held that sportswriter J. Theodore Diadiun's editorial column was neither hyperbole nor loose, figurative language and that the "general tenor" of the article did not create the impression that the type of speech was rhetorical hyperbole.[86]

The Immuno court said it did not, and does not, "hold that the assertions of verifiable fact in the McGreal letter were overridden or 'trumped' by their immediate or broader context and therefore automatically . . . protected as opinion"[87] using the now-defunct Gertz[88]-based absolute federal privilege for opinion. The New York court also agreed that all letters to the editor are not absolutely immune from defamation actions or that anything labeled opinion is automatically protected.[89] "But a libel plaintiff has the burden of showing the falsity of factual assertions."[90]

The court agreed with the New York Appellate Division review, that some of the challenged statements could be viewed as assertions of fact, but that Immuno had not proved them false under the Philadelphia Newspapers, Inc. v. Hepps[91] standard requiring the plaintiff to bear the burden of proof of falsity of the challenged statements.[92] This relieves the media defendant of the burden of proving the truth of its published statements. It also presents a difficult task to the plaintiff, who will have to prove the statements' sources and veracity without the background knowledge that the defendant has. Thus, without proven false statements, the state court found that no triable issue of fact existed for the factual statements.[93]

Then Judge Kaye reached the heart of the issue. "We next proceed to a State law analysis, and also conclude on this separate and independent ground that the complaint was correctly dismissed,"[94] regarding the statements that were considered opinion. Kaye then began her discussion of the lengthy history of New York's protection of free expression in books, movies and the arts under state common law and constitutional law, adding that the federal Constitution only fixes minimum standards applicable throughout the nation. She concluded that state courts can supplement those standards to meet "local needs and expectations."[95] The opinion then turns to the New York Constitution.

> This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas. That tradition is embodied in the free speech guarantee of the New York State Constitution beginning with the ringing declaration that "[e]very citizen may freely speak, write and publish *** sentiments on all subjects.' (N.Y. Const., art. I, § 8.) Those words, unchanged since the adoption of the constitutional provision in 1821, reflect the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong, affirmative terms.[96]

The Immuno court then holds that the expansive language of the state constitutional provision,[97] its formulation and adoption prior to the Supreme Court's application of the First Amendment to the states, the recognition of early New York history of a constitutionally guaranteed freedom of the press and the state's tradition of providing the broadest possible protection to the gathering and disseminating of news about public events "all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference."[98] Judge Kaye then held that whether the textual "interpretive" or broader background "noninterpretive" methods of text analysis are used, the "protection afforded by the guarantee of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution."[99]

Thus, the New York court referred to many localized reasons why it should use the state, rather than the federal, constitution. Additionally, it cited state common law principles which require that in defamation actions published articles should be read in context to test their effect on the average reader, not to isolate particular phrases, but rather to consider the publication as a whole.[100]

Judge Kaye then insightfully analyzed the effects of Milkovich and why using state law to protect opinion is necessary:

> Milkovich may leave an area of uncertainty for future litigation, with courts and authors in the interim lacking clear guidance regarding the opinion privilege; while all of the Supreme Court Justices agreed on the rule, they differed sharply as to how the rule should be applied. If we again assume the identity of State and Federal law, and assume that Milkovich has effected no change in the law, we perpetuate the uncertainty in our State law. Moreover, we are concerned that -- if indeed "type of speech" is to be construed narrowly -- insufficient protection may be accorded to central values protected by the law of this State. We would begin the analysis -- just as we did in Steinhilber [v. Alphonse][101] . . . with the content of the whole communication, its tone and apparent purpose. That is a clear and familiar standard that in our view properly balances the interests involved. It has been consistently applied throughout the State for several years, following State common law and following Steinhilber.[102]

Judge Kaye then concluded that, as previously held in Immuno, the Steinhilber standard is the New York method for separating actionable fact from protected opinion. Judge Kaye further discussed the importance of the letter to the editor column as a public forum and a context in which readers do not assume that the words printed are necessarily the truth -- in other words, the "broader context" and "immediate context" factors in the Ollman four-factor fact/opinion analysis. These are the factors that Judge Kaye said are combined and transformed by the Milkovich Court into a "type of speech" category. Here, the state court preserves and uses these context factors, clearly not the recommended method in Milkovich. But it works because it is the state high court's interpretation of the protection mandated by the state constitutional provision protecting speech and the press.

As for immediate context, the Journal of Medical Primatology has a specialized "average" readership, said Kaye, who would understand issues addressed in the publication. The prefatory editor's note would also make clear that the subsequent letter was McGreal's opinion and that Immuno disagreed with her.[103]

> [S]tatements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying any facts. . . . Our State law analysis of the remainder of the letter, however, would not involve the fine parsing of its length and breadth that might now be required under Federal law for speech that is not loose, figurative or hyperbolic. . . . Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context.[104]

Judge Kaye concluded by reaffirming the value of summary judgment in libel cases. "Indeed, this is an additional ground for preferring the independent State law approach to one that might make summary disposition less likely (see, Milkovich v. Lorain Journal Co., . . . 110 S.Ct. at 2698 . . .)."[105]

The Immuno Concurrences – Three other views, one result

In Immuno, Chief Judge Wachtler and Judges Alexander and Bellacosa concurred with Judge Kaye in her opinion. Judges Simons, Titone and Hancock concurred in separate opinions. There were no dissents. Judge Kaye, in a footnote,[106] commented that [a]ll of the concurrers joined unanimously in the first Immuno opinion (which invoked both the State and Federal Constitutions as the basis for the decision), [and] they joined unanimously in the Steinhilber analysis beginning with the "content of the whole communication, its tone and apparent purpose"[107] and noted that they all awarded summary judgment to the defendant in Immuno.

Judge Simons would have affirmed on federal constitutional grounds alone, deferring the state constitutional issues for a further remand by the U.S. Supreme Court.[108] He did not approve of the majority's avoidance of Supreme Court review. He also stated that the use of dual constitutional grounds "violates established rules of judicial restraint. Traditional doctrine holds that a court should decide no more than necessary to resolve the dispute before it. Constitutional questions should be avoided if possible."[109] He also wrote that Milkovich v. Lorain Journal Co. is not the threat to uses of context analysis in First Amendment free-press claims. Rather, he concurred for affirmance "solely on the ground that the plaintiff's claims are not actionable under the holding in Milkovich."[110]

Judge Titone concurred, agreeing with many of the concerns addressed by Judges Simons and Hancock in their concurrences "about the propriety and wisdom of deciding this appeal on alternative State and Federal constitutional analyses."[111] But he wrote that the "controlling legal principles should, at least in the first instance, be derived from State, rather than Federal, law."[112] This is the reverse of Judge Simons' federal primacy approach. Finally, Judge Titone would first use the state common law "fair comment" privilege for opinion, which had also been recommended in Milkovich,[113] because the Immuno defense originated in state common law, not in state constitutional law.

Judge Titone does agree with Judge Kaye and the majority in the legitimacy of the use of the state constitution defamation rules and does not believe that state judges should unnecessarily invite Supreme Court review of state court judgments.[114] Nevertheless, he wrote, his approach "has the well-established principle that courts should avoid passing upon constitutional questions when the case can be disposed of in another way."[115]

Judge Hancock agreed with Judge Simons that the appeal could be resolved under Milkovich without addressing the issue of context:

> I would hold that nothing in Milkovich suggests that the Supreme Court has altered its attitude toward the context of the circumstances surrounding written or spoken words as an obvious and ordinarily indispensable consideration in deciding the legal question "of what the average person hearing or reading the [words] would take [them] to mean."[116]

Judge Kaye, in her discussion of the three separate concurrences, concluded, "Among the possible approaches to the single result we all agree is correct -- the concurrers have put the full range of alternatives before the public -- we continue to believe that the majority's choice best serves all of the interests at stake."[117]

Interpreting State Constitutions

The first question to ask when deciding on the media's libel defense is whether federal or state law should be used. If the defendant believes it will be more sure of winning the case if state constitutional law is used rather than the First Amendment, the next question to ask is when would this be proper? Is the state involved in the claim amenable to use of state grounds? Check the case law of the state relating to such defenses and determine if the court has used the primacy, interstitial or independent theory to analyze the state law defense.[118]

The primacy theory contends that the state constitution should be the first source of rights protection.[119] The federal Constitution should only be consulted if the state provides no protection. The interstitial theory requires state courts to refer to the federal Constitution first. Only if there is no protection here should the court then turn to its state constitution. The third theory, the independent or dual, says both constitutions should be consulted whenever a constitutional right is asserted.[120]

There is an element of risk in choosing the less traveled legal path. If case precedents indicate clearly that your state is an interstitial theory state like Illinois or Florida,[121] your chances of winning under a state constitutional law claim may be slim to none, unless there has been a dramatic turnover in state high court jurists recently. It is obvious that careful, in-depth research of all types must be done if you are breaking new ground.

One method that the New York Court of Appeals uses is interpretive review,[122] which is based on the actual language of the constitutional provision. This may only be applied, however, when the state provision differs from or antedates the federal counterpart. New York's provision does both.

Appendix A shows the state-by-state survey of many of the textual elements that can be used in interpretive analysis. One of the most important is the use of affirmative and/or prohibitive language in the provisions. Twenty-six states use affirmative as well as the First Amendment limiting or prohibitive language, thus giving double protection to speech and the press. Eighteen use only affirmative language, which makes the state text quite different from the First Amendment text. All of these states can easily use interpretive analysis.[123] Also, because Gitlow, which incorporated the states into the First Amendment, was not decided until 1925, many states have their own free speech/press provisions that antedate this incorporation.[124]

Interpretive analysis may include determining:

> [1] whether the textual language of the State Constitution specifically recognizes rights not enumerated in the Federal Constitution;
> [2] whether language in the State Constitution is sufficiently unique to support a broader interpretation of the individual right under State law;
> [3] whether the history of the adoption of the text reveals an intention to make the State provision coextensive with, or broader than, the parallel Federal provision; and
> [4] whether the very structure and purpose of the State Constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the State.[125]

The case for using the state free speech/press provisions to enhance these rights is a clear one in New York because its 1821 provision[126] antedates Gitlow by more than 100 years. Richard J. Tofel wrote in 1989:

> As more cases involving the invocation of state constitutional free press rights come before the [New York] court, we may expect that the broad language of article I, section 8, and its adoption and application more than 100 years before the incorporation of the first amendment, will buttress expansive interpretations of those rights, particularly in determining the meaning of the first clause of the state provision.[127]

Tofel added that where the New York provision's language does not differ materially from the federal language, "This may account for the court's simultaneous use of non-interpretive review in facing the free expression issues of . . . O'Neill."

Noninterpretive analysis includes consideration of:

> [1] any preexisting State statutory or common law defining the scope of the individual right in question;
> [2] the history and tradition of the State in its protection of the individual right;
> [3] any identification of the right in the State Constitution as being one of peculiar state or local concern; and
> [4] any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.[128]

Thus, while the interpretive method deals in the micro-issues regarding the specific text, the noninterpretive analysis examines macro-issues that generally parallel the interpretive ones, but on a grander scale. For example, where the interpretive method studies the history of the adoption of the provision itself, the noninterpretive method examines the history and tradition of the state generally in reference to individual rights.

Professor Michael J. Perry noted that the U.S. Supreme Court uses both interpretive and noninterpretive review, although it rarely acknowledges using the latter.[129] Interpretive is more traditional in that it respects the intent of the framers of the state constitution, while noninterpretive analysis uses current societal attitudes. These are Scalian and Brennanesque views, respectively. But when both methods are used in one defense, they arrive at a result like that in Immuno, which respects both the past and the present.

With legal weaponry such as this, any state could make a case for use of its constitution in preference to the First Amendment. The use of comparative law methods, referring to successful use in other states such as New York, would bolster the defense as well.

State statutes which would be supportive of enhanced free speech/press protection could include the fair report privilege and source shield laws, freedom of information laws and other open government laws.[130] Length of existence of the free speech/press provision and indications of contemporary tolerance of and support for free expression in state case law is similarly supportive.[131]

While a number of states, including New York and California, have extended state constitutional protections beyond those granted under the federal Constitution, there are many that have not done this yet.[132] This should not keep the media defendant from trying, however, because in each state there must be a first time. For some states, that first time could be now.

A Digest of Selected States to Assess the Viability of Modern Federalism in Libel Law

The following is a study of states selected mainly for geographically diverse locations, with the exceptions of California and New York[133], which were obvious choices because of their pro-federalism position today. The federalism field in libel law is clearly not crowded yet, although there may be potential players that need only a gentle nudge to persuade them to join the modern federalism movement.

Some state jurists clearly disapprove of modern federalism.[134] Others seem poised take the plunge despite a dearth of case law on point.[135] Obviously, a lack of case law is better than negative decisions on point. However, courts can always change their minds about the use of federalism in libel law as it gains acceptance nationally.

The states surveyed show a full range of philosophies from acceptance of federalism principles, as in Texas and California, to a total rejection of the concept, as evidenced in case law, as in Florida and Delaware.[136]

Although a state like New York has high court judges with differing views, as evidenced in the Immuno concurrences, this did not keep them from joining Judge Kaye's affirmance of the lower court's holding. In addition, none of them categorically rejected the use of state constitutions.

This suggests the final popular question in support of federalism -- Why would a state need its own free speech and press provision, indeed, its own constitution, if it were not intended to be used by its citizens and its courts?

ALASKA

Alaska became a state in 1959 after decades of fighting for that status.[137] It's current constitution went into effect when President Dwight D. Eisenhower signed the formal proclamation of statehood on January 3, 1959.[138] Alaska's free speech and press provision[139] is one of the briefest,[140] although it contains the basic concepts found in nearly all state provisions -- protection of speech and writing/publishing and the caveat that "abuse" of that right will bring a reckoning, generally a defamation claim and possible trial. Notice that there is no limiting or prohibitive language in the grant of the rights, as is found in the First Amendment.

This positive language is amenable to interpretive analysis, which is supported in Alaska's case law. This makes the use of the state's speech/press provision to enhance protection not only a possibility, but also gives it a good chance for success.

Three Alaska state cases prove this point. In State v. Browder,[141] the Alaska Supreme Court held that it does not have to look only to the U.S. Supreme Court for guidance or limit itself to the national minimal constitutional standards required of the states by the Court after Gitlow. Rather, the state high court is free, and is under a duty to develop additional constitutional rights and privileges under the Alaska Constitution.

A decade later, two Alaska cases confirmed this position. In Messerli v. State[142] and in Mickens v. City of Kodiak,[143] the state Supreme Court held that the state free speech clause was meant to be at least as protective of expression as the federal First Amendment, and that it can act more explicitly and directly than the federal Constitution.

CONNECTICUT

The Connecticut Constitution has created three free speech-related provisions where other states have generally used one provision.[144] The significance of this may be negligible because New York, for example, grants greatly enhanced freedom under its speech/press provision[145] just as Connecticut does. At least one commentator wrote that the state's free speech theory appears to have preceded the federal government's -- by common law before

1804, by statute from 1804 to 1818 and constitutionally after 1818.[146] In addition to this historical approval of these freedoms, in 1987 the Connecticut Supreme Court in Dow v. New Haven Independent, Inc.[147] held that statements in a newspaper editorial criticizing a public official were entitled to an absolute, unconditional privilege under the state constitution.[148] This was also the approach in New York's Immuno v. Moor-Jankowski.[149]

Further support for enhanced speech/press protection comes in a 1986 case, Williams v. Coppola,[150] in which the state high court held that when using the state constitution, the court must interpret it independently of the U.S. Constitution when required to do so by its text, history, tradition and intent. This encourages use of both interpretive and noninterpretive analysis of the state provision.

With the longstanding state history of protection of speech and the press and current case law validation of Immuno methods, Connecticut seems a fertile field for enhanced speech/press protection for the media defendant. But there is one warning. The state Supreme Court in 1984 did not allow the National Organization for Women to solicit signatures on a petitiona and to distribute educational literature in a shopping mall in Cologne v. Westfarms Associates.[151] There have been "mall" cases decided in about fifteen states, with varying outcomes regarding free speech rights versus private property rights. The U.S. Supreme Court held in Pruneyard Shopping Center v. Robins[152] that although states may allow free speech activities in privately owned shopping malls, as it did here in its affirmation of the California case. The Court held that a state may also restrict these rights if the state values private property rights more highly than the right to speech or petition, as was done in Westfarms.

The mall cases may have more to do with who is petitioning or demonstrating than with property rights themselves. Thus, it would still seem reasonable to use an Immuno defense in Connecticut for the media.

DELAWARE

The first state to sign the Declaration of Independence may be one of the worst states in which to seek enhanced protection for speech and the press. The language of this atypically worded state provision[153] appears to be limited to freedom to write, but not speak or otherwise express oneself, concerning public officials and public figures. But this is modified in the second clause, which states that citizens of the state may print on "any subject."[154] This wording would appear to muzzle the illiterate and those without access to a printing press.

In 1974, in In re Opinion of the Justices,[155] the Supreme Court of Delaware held that "[I]t is probable that the free press provision of the Delaware Constitution, Art. 1, § 5, has the same scope as the First Amendment."[156] Thus, there is speech protection, too, but no more than that granted by the U.S. Supreme Court to date -- the dreaded "lockstep" approach to constitutional interpretation. This judicial bomb could be dropped on any case attempting to use state constitutional law to enhance press and speech protections in Delaware. Caveat media.

NEW JERSEY

New Jersey's free speech and press provision[157] uses wording almost identical to that of a number of other states.[158] And happily for state free speech and press proponents, at least some members of the New Jersey Supreme Court were willing in a 1980 case to use only the state free speech provision to protect a plaintiff from a trespass complaint brought by Princeton University when he distributed political literature on campus.

In State v. Schmid,[159] the majority opinion written by Justice Handler held, "On numerous occasions our own courts have recognized the New Jersey Constitution to be an alternative and independent source of individual rights. He cited State v. Johnson,[160] in which state Supreme Court Justice Sullivan had observed that although a New Jersey constitutional provision relating to searches and seizures was "identical to the federal Fourth Amendment provisions,' we have the right to construe our State constitutioanl provision in accordance with what we conceive to be its plain meaning.'"[161]

Justice Handler continued in Schmid:

> [T]his Court has recognized through Chief Justice Willentz that freedom of the press, intimately associated with individual expressional and associational rights, is strongly

> protected under the State Constitution (N.J. Const. (1947), Art. I, par. 6, state statutory enactments (e.g., N.J.S.A. 2A; 84A-21 et seq. ("shield law"), and state decisional law. See State v. Boiardo . . . 416 A.2d 793 (1980)(Boiardo II); State v. Boiardo, 414 A.2d 14 (1908)(Boiardo I)
> . . . The United States Supreme Court itself has acknowledged that the First Amendment, which implicates this important freedom does not accord to it the degree of protection that may be available through state law, Branzburg v. Hayes, . . . 92 S.Ct. 2646 . . . (1972) . . . A basis for finding exceptional vitality in the New Jersey Constitution with respect to individual rights of speech and assembly is found in part in the language employed. Our Constitution affirmatively recognizes these freedoms . . . The constitutional pronouncements more sweeping in scope than the language of the First Amendment, were incorporated into the organic law of this State with the adoption of the 1844 Constitution, N.J. Const (1844) Art. I, pars. 5 and 18. They were, however, directly derived from earlier sources, e.g., the free speech provision was modeled after Article 7, Section 8 of the 1821 Constitution of the State of New York (now N.Y. Const (1938), Art. 1, § 8).[162]

New Jersey's current speech/press provision adopted in 1947 is identical to the one in the state's 1844 Constitution.[163] The Schmid case is also a rich source of other case law supporting the use of the New Jersey Constitution to enhance individual rights and of comparative law such as the supportive "mall" cases,[164] which pit free speech rights in a quasi-public mall forum against the private property rights of shopping mall owners. The California mall case, Pruneyard Shopping Center v. Robins, was heard in 1980 by the U.S. Supreme Court,[165] which held that states could choose either to favor the speech or property rights of their citizens in light of their individual interpretations of each state's law. Thus, some states such as New Jersey and California have favored free speech, while others such as Connecticut have favored property rights.[166]

It appears that New Jersey has a more than hospitable atmosphere in which to use modern federalism in libel law.

ALABAMA

The Alabama Constitution's free speech and press provision contains the standard affirmative and prohibitive language and the cautionary reference to responsibility for "abuse" of these rights.[167]

An interpretive analysis of the text here supports a more expansive use of the state provision because it not only has language mirroring the limiting text of the First Amendment, but also affirmative language nearly identical to that of the New York and Alaska provisions -- both pro-federalism states.[168]

The annotated text of the Alabama Constitution of 1901, in historical notes following the preamble, cites Pickett v. Matthews.,[169] In Pickett, the state high court holds that interpretation by the U.S. Supreme Court of the federal Constitution is persuasive, but not controlling on the state high court in construing similar provisions of the Alabama Constitution. This 50-year-old opinion should support a modern federalism state constitutional defense.

In Barton v. City of Bessemer[170] in 1937, the state court held that freedom of the press is one of the basic rights, equivalent in importance to the right to due process and the pursuit of happiness. Further support can be found in In re Dorsey,[171] in which the court held that the state Bill of Rights is the controlling part of the state constitution. These noninterpretive analysis elements are particularly valuable when there is no state case law on point.

Alabama appears to be a state that could easily take the plunge into modern federalism in libel law -- with a fair chance of success. State Supreme Court jurists should be researched carefully because the supportive cases are old and do not necessarily reflect the current judges' thinking.

FLORIDA

The 1968 revision of Florida's 1885 Constitution has a free speech/press provision[172] that has both affirmative and negative language and libel action references typical of many other state constitutions.[173] Its expansiveness beyond that of the prohibitive wording of the First Amendment and its lack of material change from the original 1885 provision evidence a state satisfied with going beyond the federal provision, at least textually.

But, Sandy D'Alemberte's commentary following the annotated text of the state provision[174] says nothing about state history or traditions encouraging an expanded use of the state provision. Rather, he writes that, "The rights treated in this section are also protected in the First Amendment to the U.S. Constitution and, under the Fourteenth Amendment, the United States Bill of Rights is a limitation on state power."[175]

This lack of support for enhanced state speech and press protection is supported by numerous state cases which confirm that the Florida Constitution is similarly not a grant of power, but rather merely a limitation on legislative power -- despite the clearly affirmative language in the speech provision's text.[176]

Further evidence of a lack of support for enhanced protection possibilities under the state constitution is State ex rel. Singleton v. Woodruff,[177] a 1943 case in which the Florida Supreme Court held that the free speech/press and religion provision of the Florida Constitution "merely reinforced the Federal immunization of these liberties."[178] These are older cases, and perhaps a modern case could be made for use of the state constitution to protect speech beyond the federal minimum. But, caveat media.

LOUISIANA

The state of Louisiana adopted a new Constitution and Declaration of Rights in 1974. Its speech provision's simple, familiar wording, much like that of a number of other state provisions, goes beyond the federal speech/press provision by including affirmative language and a caveat about consequences resulting from the abuse of these rights.[179] The language is also familiar to Louisiana residents, who have seen it in substance since 1921, when almost identical wording was used in the state constitution adopted that year. This is a useful interpretive analysis element.

During the 1973 Constitutional Convention in Louisiana, the Committee on the Bill of Rights and Elections worked from existing federal rights guarantees in drafting most of its proposals, and produced a document that has as its primary background the federal standards in the area. Lee Hargrave, who was coordinator of legal research for the convention, wrote in 1974 that many people on the Bill of Rights Committee did not like the idea of innovative language and were especially loathe to "particularize the guarantee[s] . . . The result of this long debate is to continue the basic language of the prior law in form and to continue the substance of existing United States Supreme Court constructions of the guarantee," -- another "lockstep" state.[180]

Hargrave added that this would mean slow growth in the free speech and press state constitutional law field in Louisiana. Caveat media.

TEXAS

The Texas Constitution of 1876, the current organic law of the state, was based on the state Constitution of 1845, Texas' first constitution after gaining statehood.[181] The free speech and press provision has retained the same basic wording since the pre-statehood Constitution of 1836.[182]

An interpretive commentary following the speech provision text states, "The federal limitation is binding upon the Texas courts and its scope cannot be affected by the provisions of the state constitution."[183] This sounds like a lockstep mirroring theory in which Texas follows the U.S. Supreme Court's First Amendment interpretations.

Prof. James C. Harrington wrote in 1990 that, "The 1875 delegates viewed the political functions of the federal and state constitutions in very different lights."[184] He theorized that the affirmative rights and the governmental restrictions "suggest that state government may have the affirmative duty to ensure citizens the ability to invoke their rights of expression."[185]

Harrington conceded that "[l]ibel remains one of the thorniest thickets facing the liberty of speech and press despite the dogged efforts of state and federal judges to sort out the issues and fashion appropriate tests."[186] He cites the Texas Supreme Court in Casso v. Brand[187] in 1989. The court reinstated the libel defendant's summary judgment, holding that his two political radio advertisements were protected by the state common law "fair comment" privilege for opinion. However, the court did discuss the "greater free-speech protection under the Texas Bill of Rights."[188] In further support of the protective nature of the state provision, Supreme Court Justice Raul Gonzalez in his Casso concurrence favored accentuated state constitutional protection under section 8 that would require a defamation plaintiff, in order to resist summary judgment, to show actual malice by clear and convincing evidence after reasonable opportunity for discovery.[189]

Harrington concludes, "Ultimately, it seems, the court will have to confront the issue of whether section 8 provides defamation defendants with protections beyond those already provided by the first amendment."[190] The concurrence in Channel 4, KGBT v. Briggs in 1988 stated that state law can indeed give greater protection to speech and the press than federal law.[191]

It would appear that Texas' high court may be another fertile field for testing the viability of enhanced state protections for media libel defendants.

ARKANSAS

The wording of the free speech and press provision of the 1874 Arkansas Constitution looks quite promising. From the interpretative analysis point of reference, it is all in affirmative language, mentions freedom of the press in strong terms and placing that first, and generally uses more colorful adjectives to describe these freedoms, e.g., "inviolate" and "invaluable."[192] This persuasive wording becomes even more convincing when the history of the constitution is examined. In 1980, a proposed new constitution was defeated at the general election of November 4, 1980. The vote was 276,257 for the new constitution and 464,210 against it.[193] The citizens of Arkansas apparently saw no reason to fix something that didn't appear to be broken.

From the noninterpretive perspective, the media are also convincingly supported by a free press/fair trial case in the very year that the proposed constitution was defeated. In Arkansas Gazette Co. v. Lofton,[194] the Arkansas Supreme Court held that any restraint on freedom of the press, no matter how narrow in scope and duration, must be subject to the closest scrutiny and would be upheld only on a clear showing that the free press exercise would present a clear and imminent threat to the fair administration of justice. The court permitted press access in this case. Thus it is supportive, if not exactly on point regarding a libel claim.

ILLINOIS

The language of the Illinois Constitution of 1970's free speech and press provision[195] is basically the same as that of the preceding Constitution of 1870, both of which were written in affirmative language only, unlike the First Amendment.

Like Florida, however, the language appears to be robbed of its interpretive clout by the general acceptance of a "lockstep" approach to state constitutional analysis by the Illinois Supreme Court. Prof. Thomas B. McAffee wrote in 1987 that the state high court since 1961 has decided to "follow the decisions of the United States Supreme Court on identical State and Federal constitutional problems."[196] He added that there might be some movement toward adopting a new attitude of independent state court analysis as other states have been doing since the 1970's, especially in criminal law cases.[197]

In 1989, Prof. Michael P. Seng wrote that a 1988 case, People ex rel. Daley v. Joyce,[198] did conclude that comparable provisions in the Illinois and federal constitutions had independent meanings. However, Seng concluded that "[d]espite its ruling in Joyce, a majority of the Illinois Supreme Court continues to take a narrow approach toward Illinois constitutional interpretation."[199]

Illinois courts appears to be straddling the fence. A courageous defendant and courageous jurists are needed here to give modern federalism in libel law a chance to thrive. One possible argument could be that free speech and press issues have not been settled in the state along the lockstep lines because it is a new federalism field just opening up -- a field ready for a new approach.

IOWA

The text of the Iowa Constitution of 1857 is standard language for such provisions, using both affirmative and prohibitive language that goes beyond the First Amendment as well as mirroring it in part.[200] But like Illinois, the Iowa Supreme Court held as recently as 1988 that "[b]ecause these state provision are almost identical to the federal Constitution, this court has accepted interpretation of the federal Constitution as the proper interpretation of the Iowa Constitution as well."[201] Another "lockstep" state marches to the federal tune.

Michael A. Giudicessi wrote in 1989 that, "As First Amendment applications were expanded by the United States Supreme Court, the Iowa court increasingly applied federal and state speech and press rights concurrently. The tandem rights were merged into one."[202]

Giudicessi contends that the Iowa Constitution provides protection

> beyond the proscription of legislation abridging or restraining freedom of speech or of the press. . . . This distinction is more than semantic. Under independent state review, the affirmative rights found only in the Iowa Bill of Rights and not in its federal counterpart make it possible for the Iowa Supreme Court to expand speech and press protection in two ways. First, . . . even where state and federal provisions are identical, the interpretation on state grounds need not reduce the protection afforded by the federal law. Second, the distinct language gives the state court a clear, independent mandate for extending protection.

This is a good example of an interpretive analysis of the text of a speech/press provision.[203]

Giudicessi then concedes that "The recent tendency of the Iowa court has been to conduct its review of speech and press rights under the First Amendment by stating at the outset of its analysis that the state and federal constitutional provisions are virtually identical in their language and protection."[204]

Despite this trend, the high court in Iowa Freedom of Information Council v. Wifvat[205] in 1983 held in this press access case that as a matter of state constitutional law a right of public access applies to pretrial suppression hearings.[206] This, says Giudicessi, is evidence "that independent Iowa state constitutional grounds have secured speech and press rights notwithstanding the Iowa Supreme Court's declarations that the state and federal constitutions provide only concurrent rights. . . . Cases from other jurisdictions in the speech and press areas further show that the Iowa court could rely on Article I, Section 7 to provide expanded safeguards with respect to other issues involving those fundamental freedoms."[207]

Unfortunately, after Giudicessi wrote this encouraging article, the state Supreme Court in 1989 decided Jones v. Palmer Communications, Inc.[208] In Palmer, the court limited the scope of application of the public official/public figure definition and declined to adopt or reject the neutral reporting privilege. The court, instead of expanding speech and press rights under the state provision, placed emphasis on the restraints "arguably imposed by Article I, Section 7"[209] -- a direction that is 180 degrees from that urged in Giudicessi's article.

This goes against use of the Iowa Constitution to enhance speech and press freedoms.

MICHIGAN

Michigan adopted a new Constitution in 1963. In it, only one word of the previous 1908 Constitution's free speech and press provision was changed and a new one added. Prof. Harold Norris was a delegate and served as vice chairman of the Committee on the Declaration of Rights. His proposed changes were adopted unanimously at the 1963 Constitutional Convention and included changing the word "sentiment" in the 1908 provision to "views" and adding "express" to the category of freedoms -- write, express and publish.[210]

Norris said that the intention was to not only protect traditional guarantees, but also to "enlarge the orbit of protected communications. "He added that the federal provision sets a minimum standard of protection, not a maximum. "The state can be more protective."[211]

With this expansive atmosphere in 1963 as the background for use of the modified state provision, we then turn to subsequent commentaries on the actual interpretation by the Michigan courts. Prof. Maurice Kelman wrote in 1981 that there is an "oddly selective state court independence from federal decision, activated in connection with some sections of the state Bill of Rights but not others. . . . For example, the search warrant or the double jeopardy provisions [are construed by the state court] more favorably to defendants than does the [U.S.] Supreme Court, but chaining the state court to current federal understanding of, say, freedom of speech or religion."[212]

In Book Tower Garage, Inc. v. Local No. 415[213] in 1940 the Michigan Supreme Court held that "the same liberty of speech and press is secured by the Constitution of the State of Michigan" as is guaranteed by the First Amendment. Kelman adds that "Michigan judges have not been influenced by textual dissimilarities and, indeed, have dismissed their importance.[214]

This would seem to defeat any attempts at interpretive or noninterpretive analysis. Case law in recent years, which reflects the operative legal history and traditions of Michigan state law, has not evidenced a change from the lockstep, state-equals-federal constitutional law interpretations. Caveat media.

ARIZONA

The language in the Arizona free speech provision is open-ended and affirmative only.[215] But it doesn't speak of the "press" using exactly that word. This may be a small detail, but it could also be a telling point.

Although Arizona, like Alabama, offers more protection to due process rights under the state constitution, the Arizona Court of Appeals in Fiesta Mall Venture v. Mecham Recall Committee[216] in 1989 held that the comparison to the Fourth Amendment right "is of no assistance in determining the extent of a citizen's free speech rights under article II, § 6."[217]

This may be discouraging, but recall that the "mall" cases are not the same as press cases in that they always represent a conflict between freedom of speech and private property rights. Since media speech/press cases do not set up this scenario, the media defendant could distinguish between the two types of cases.

This points out the need for court and counsel creativity when putting forth the state speech provision as granting greater protection. Here, as in similar situations in other states, use of comparative law, especially the Immuno decision and its rationale, may save the day when there are no cases on point.

There is a more worrisome slander case decided in 1991. In Yetman v. English,[218] the Arizona Supreme Court held that a state legislator's reference at a luncheon meeting to a county supervisor as a "communist" was not rhetorical hyperbole or loose language protected by the First Amendment or the Arizona Constitution. Rather, the court held that the word might imply actual facts about plaintiff Yetman and reversed for a new trial to see if the statement was defamatory.[219] If the comment, which appears to be hyperbolic on its face, is not protected by the state constitution, then media defendants in Arizona may have a more difficult time using the Immuno approach to gain enhanced state speech/press protection.

The court in Yetman stated: "None of the language in article 2, § 6 of the Arizona Constitution even remotely suggests an absolute privilege to damage the reputation of another person. . . . Indeed, we have an independent constitutional obligation to ensure that the right to recover damages for injury to reputation is not unduly impinged."[220] This is a media nightmare of a decision that turns the state constitution against the media. CAVEAT MEDIA.

CALIFORNIA

The free speech and press provision in the California Constitution of 1879 is unique not only in its length, but also in the insertion of its "shield law," which protects both print and broadcast media from being held in contempt of court if they refuse to divulge a confidential source's name or refuse to disclose unpublished information.[221]

This noninterpretive element has been made interpretive through its actual insertion into the provision in 1974.[222] As part of Article I, Section 2's text, the shield law emphasizes the state's express desire to protect the press from any police or judicial infringement of its rights.[223]

The California Supreme Court also generally has supported free speech rights to a greater extent than most of the other state courts that have decided shopping mall free speech/private property cases. One California mall case went to the U.S. Supreme Court.[224] It affirmed the state high court decision in Robins v. Pruneyard Shopping Center[225] holding that the provisions of the California Constitution guaranteeing freedom of speech and the right to petition the government protect the public's right to use privately owned shopping centers as forums for speech-related activities.[226]

The California Supreme Court held, "We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."[227] It cited the public character of shopping centers in our society and agreed that impairment of the private property owner's interest was at best theoretical.[228] The state court also held that, "Though the [state] framers could have adopted the words of the federal Bill of Rights, they chose not to do so."[229]

California has much statutory as well as case law granting privileges to the press in addition to the shield law included in the state free speech provision.[230] Jon Sylvester wrote in 1986 that "[I]t appears that California's courts and Legislature tend to lean toward the protection of news media when the countervailing interest is primarily a governmental interest. Conversely, when the exercise of 'media rights' would tend to infringe on individual rights (such as press access to court proceedings), the policy of the state seems to favor the protections of the threatened individual rights."[231]

The difference between the press access and media libel actions is that much of what the press publishes is government-related, and thus likely to make the media a winner. The perceived distance from the individual affected in a publication is also greater than that of the press when it is present at an actual trial where someone's life or reputation is immediately on the line. In addition, free speech as publication is closer to the individual right of free speech for all.

COLORADO

It would appear that the affirmative and prohibitive language of the Colorado Constitution's free speech provision[232] gives room for broader interpretation than does the prohibitive language of the First Amendment.

Supporting this, the Colorado Supreme Court has held as recently as 1989 in People v. Ford[233] that it would construe the state freedom of speech provision more broadly than the federal one.[234] In Burns v. McGraw Hill Broadcasting Co.[235] in 1983, the state court held that context and even cautionary language and extrinsic circumstances surrounding a statement should be considered.[236] This is extemely protective of opinion in libel cases. The one caveat here is that such broad protection may not meet with U.S. Supreme Court approval if a case like Burns were ever to go for certiorari to the federal Court. It would be best to avoid a cautionary language defense in a federal appeal because such language was specifically disapproved in Milkovich v. Lorain Journal Co. in 1990 as being a mere "label" which could be tacked onto any defamatory statement.[237]

Generally, it appears that the Colorado Supreme Court is receptive to enhanced protection for the media in libel cases via its constitution's free speech provision.

Conclusion

Judge Judith S. Kaye of the New York Court of Appeals in Immuno A.G. v. Moor-Jankowski[238] formulated an affirmative defense for opinion in a libel claim that used only the state constitutional provision protecting freedom of speech and of the press. This was done without entangling state law with federal First Amendment law, which, under Michigan v. Long would have caused the holding to be based on federal law by default. Instead, because of the clean break between the two types of law, there could be no confusion as to which law was being used to protect the statements the court held to be opinion. When Immuno appealed after the media defendant won, the U.S. Supreme Court denied certiorari in 1991, the year of the second state high court Immuno decision.

This use of state law has been dubbed the "new federalism" and has been a popular topic for legal commentators since the 1970's. Libel law is just now beginning to enter the modern federalism arena, with Immuno as its torchbearer. The next question is what will happen if other states try the Immuno method? To begin testing the waters, this article has not only analyzed the New York court's holding, but has charted a number of elements that can be used in each of the 50 states to establish at least part of an affirmative defense based on each state's constitution. This survey deals with elements that can be used in interpretive constitutional analysis, that is, analysis of the text of the speech provision itself and history of the text's adoption.

Findings show that 44 states have free speech provision texts that differ materially from the First Amendment text, which is written in prohibitive language only. Twenty-six states have affirmative as well as prohibitive language; 18 have only affirmative language; and 6 have First Amendment-style prohibitive language only. More than half of the state constitutions were written before the First Amendment was applied to the states in Gitlow v. New York in 1925, thus distancing them from the federal Constitution and giving more credence to claims of state independence from federal constitutional law influences. Thirty-three of the state provisions evidence a strong desire to protect speech and the press through use of two or more supportive statements, e.g., affirmative and prohibitive language. And no state gives less than moderate, one-statement support to speech.

In the digest and Immuno/New York sections of this work, a total of 15 states were analyzed from both an interpretive viewpoint, as in Appendix A, and from the broader-based noninterpretive method, which includes case law analysis and general history and social climate in the state. These mixed analyses of selected states resulted in a strange symmetry in the findings. Seven states looked promising for a plunge into modern federalism in libel law -- Alaska, California, Colorado, Connecticut, New Jersey, New York and Texas. Seven states did not appear to be hospitable -- Delaware, Louisiana, Florida, Illinois, Iowa, Michigan and Arizona. This doesn't mean, of course, that a courageous defendant can't try anyway. Two states straddled the fence -- Alabama and Arkansas. There are possibilities here, but mixed evidence in the analyses produced no clear result.

These analyses show a not surprisingly mixed picture for those who would like to try modern federalism methods to protect media defendants. Just as the United States has a citizenry with varied political and economic views, so do the states have courts that reflect these views because the jurists themselves are citizens of each state. State law analysis isn't for everyone, but for those who can master the method, it adds an extra, clear dimension to the murky morass that is American libel law. Like the nomads who pick up their belongings and go on to a new home, media defendants can become travelers down an uncharted road as the outcome of future U.S. Supreme Court decisions creates potential self-censorship or loss of freedom by print and broadcast journalists and others fighting to preserve individual freedoms guaranteed to all in this country.

This is not a proposed death knell for the First Amendment, but rather it is a way to keep it safe by using an alternative method until it is again politic to return to federal constitutional analysis when a less conservative Supreme Court is again ready to grant individual freedoms rather than take them away.

ENDNOTES

1. Larry M. Elison & Dennis NettikSimmons, Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds, 45 MONT. L. REV. 177, 178 (1984).

2. Appointed in 1991 to replace retiring Justice Thurgood Marshall.

3. Appointed in 1990 to replace retiring Justice William J. Brennan, Jr. See, A Tribute to Justice William J. Brennan, Jr., 104 HARV. L. REV. 1 (1990) (entire volume) (Justice Marshall's tribute at 1-8).

4. Debra Gersh, Media lose a friend, Editor & Publisher, July 28, 1990, at 13. See also supra n. 3.

5. 110 S. Ct. 2695 (1990). (The Supreme Court denied the existence of an absolute opinion privilege under the first amendment. It also held that a sports column in an Ohio newspaper that called petitioner Michael Milkovich a "liar" implied the fact, not an opinion, that columnist Theodore Diadiun thought Milkovich had committed perjury in two judicial hearings about an altercation at a high school wrestling match. Milkovich was one of the team coaches. Diadiun worked for the newspaper in the rival team's home region.)

6. Milkovich at 2706.

7. 94 S. Ct. 2997, 3007 (1974). In Gertz v. Robert Welch, Inc., in dictum, Justice Powell wrote, "We begin with the common ground. There is no such thing as a false idea. However pernicious it may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." Gertz at 3007.

8. Milkovich at 2701.

9. See BRUCE W. SANFORD, LIBEL AND PRIVACY § 5.3 (2nd. ed. 1991) for a discussion of Milkovich.

10. See, e.g., Ollman v. Evans, 750 F.2d 970, 975 n.6 (D.C. Cir. 1984), cert. denied. 462 U.S. 1127 (1985) (A "majority of federal circuit courts, including this one, have accepted the [Gertz dictum] as controlling law.")

11. Milkovich at 2702-03, discussing use of the "fair comment" to protect opinion.

12. 376 U.S. 254, 279-80 (1964).

13. 398 U.S. 6 (1970).

14. 418 U.S. 264 (1974).

15. 567 N.E.2d 1270 (N.Y. 1991), 111 S. Ct. 2261 (1991), cert. denied.

16. See, e.g., Scott v. News-Herald, 496 N.E.2d 699 (1986); see also pp. 7-8 and accompanying notes discussing the Scott_holding.

17. See infra pp. 17 et seq. text and accompanying notes for selected states digest discussing the likelihood of success in using state law to protect libel defendants in Alaska, Connecticut, Delaware, New Jersey, Alabama, Florida, Louisiana, Texas, Arkansas, Illinois, Iowa, Michigan, Arizona, California and Colorado. New York's Immuno A.G. v. Moor-Jankowski is discussed separately, pp. 7-14 text and accompanying notes.

18. See, e.g., Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2431-33 (1991). Justice Kennedy wrote for the majority that "We reject the idea that any alteration beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice under the First Amendment. . . . We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of New York Times Co. v. Sullivan, . . . unless the alteration results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case." Thus, the traditional allowances for some error in published quotations were not scuttled by the Court, as the media feared before the decision.

19. Id.

20. See APPENDIX A.

21. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." U.S. CONST. amend. I.

22. 45 S. Ct. 625 (1925).

23. See, e.g., N.Y. CONST. art. I, § 8 at note 96. See infra the 50 state free speech provision citations in Appendix A.

24. See, e.g., CALIF. CONST. art. I, § 2 at pp.32-33 text and accompanying notes. This provision includes the general grant of free speech and publication rights and then adds its shield law protecting reporters' confidential sources and unpublished materials.

25. See Appendix A for 50-state survey information, "Strong emphasis on press freedom?"

26. See supra, pages 8-18 and 32-33 and accompanying notes.

27. William Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 503 (1977); see also, Richard J. Tofel, "Every Citizen May Freely . . . Publish": Protecting the Press Under the New York State Constitution, 40 SYRACUSE L. REV. 1041, 1054 (1989).

28. Id. at 630; see also, Margaret A. Blanchard, Filling in the Void: Speech and Press in State Courts Prior to Gitlow, in THE FIRST AMENDMENT RECONSIDERED 14, (Bill F. Chamberlin and Charlene J. Brown eds., 1982); James Parramore, Federalism and Press Freedom: Immuno A.G. in Historical Perspective, at 18, Paper Presented Before the Law Division of the Association for Education in Journalism and Mass Communication Annual Convention, Boston, Mass. (Aug. 7-12, 1991) (manuscript available through AEJMC or on file with author); Douglas S. Campbell, THE SUPREME COURT AND THE MASS MEDIA 200-03 (1990).

29. 376 U.S. 254 (1964).

30. *Id.* at 279-80.

31. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706-07 (1990) (for a summary of federal protections for media defendants).

32. *Immuno* at 1286-89 (Judge Titone advocates the use of fair comment to protect opinion to avoid unnecessarily passing on constitutional question when the case can be disposed of in another way.). *See also infra* pp. 13-14 text and accompanying notes discussing the three separate concurrences in *Immuno*.

33. Judge Vito Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 436-37 (1987); for more discussion of the Burger Court and the media, *see generally*, Philip R. Higdon, *The Burger Court and the Media: A Ten-Year Perspective*, 2 W NEB. L. REV. 593 (1980); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422 (1980); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

34. 110 S. Ct. 2695 (1990).

35. 416 U.S. 113 (1973).

36. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 931 (1992), *cert. granted*. *See* William H. Freivogel, *Abortion: New Round of Decisions Will Spotlight Issue,* St. Louis Post-Dispatch, March 29, 1992, at B1, B7. "On April 22 [1992], the [Supreme] [C]ourt will hear [oral] arguments on the constitutionality of a Pennsylvania abortion law that could result in a decision effectively reading the right to an abortion out of the Constitution." at B1. "If the court downgrades abortion from a fundamental right, the action would be the first time in constitutional history that it had taken away a fundamental right it had previously recognized, legal scholars say," at B7. The case was decided in June 1992. The federal high court held that all of the state law restrictions on freedom to have access to an abortion unimpeded by government were constitutional except the requirement for a woman to get a spouse's permission before getting an abortion. *Roe v. Wade* was not overruled, but the allowance of the Pennsylvania restrictions eroded what *Roe* has meant since the 1970s.

37. 111 S. Ct. 2419 (1991).

38. *See supra,* note 18 and accompanying text.

39. Numerous articles have been written about the "new federalism." This is only a sampling. More citations may be found in these articles. *See generally,* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Tofel, *supra* note 24; Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 489 (1980); Shirley S. Abrahamson, *Reincarnation of State Courts,* 36 SW. L. J. 951 (1982); Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. & LEE L. REV. 5 (1989); Collins, *Reliance on State Constitutions--Away From a Reactionary Approach,* 9 HASTINGS CONST. L. Q. 1 (1981); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985); Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgement,* 8 U. PUGET SOUND L. REV. 157 (1985); Earl M. Maltz, *False Prophet--Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L. Q. 429 (1988);

40. *See, e.g.,* Michigan v. Long, 103 S. Ct. 3469 (1983).

41. See, e.g., Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980).

42. See, e.g., Arkansas Gazette Co. v. Lofton, 598 S.W.2d 745 (1980).

43. See Titone, supra at p. 3.

44. 103 S. Ct. 3469 (1983).

45. Long at 3476.

46. Id. at 3476.

47. Long at 3475, citing Herb v. Pitcairn, 65 S. Ct. 459 (1945).

48. Immuno, 567 N.E.2d 1270 (1991), 111 S. Ct. 2261 (1991), cert. denied.

49. Long at 3476-77, citing Minnesota v. National Tea Co, 309 U.S. 551 (1940) at 557.

50. 309 U.S. 551 (1940).

51. Id. at 3476.

52. See generally, Elison & NettikSimmons; Eric B. Schnurer, The Inadequate and Dependent "Adequate and Independent State Grounds" Doctrine, 18 HASTINGS CONST. L.Q. 371 (1991); Steward G. Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 TEX. L. REV. 977 (1985); Terrance Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 SUP. CT. REV. 187 (1965).

53. Id. at 3478.

54. Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849, 2852 (1977).

55. Id. at 2853. See also, Elison and NettikSimmons at 193.

56. 87 S. Ct. 534 (1967).

57. 84 S. Ct. 710 (1964).

58. But see, Robert F. Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds, 63 TEX. L. REV. 1025, 1027-30 (1985) (The author concludes that state courts should apply a dual state/federal approach to state constitutional analysis to promote continued participation by state courts in the growth and development of federal, as well as state, constitutional law. The dual sovereignty method can be approached in two ways. First, the state court can apply a federal interpretation to state constitutional provisions. Second, state analysis can be independent of federal analysis, although both are done for the same claim. Justice Utter concedes that the dual model "even more than the other models, generates opinion that critics can call 'advisory.'" at 1029).

59. Long at 3476-77.

60. Immuno A.G. v. Moor-Jankowski, 567 N.E.2d 1270, 1277 (1991), citing O'Neill v. Oakgrove Constr., 523 N.E.2d 277 (1988).

61. 567 N.E.2d 1270 (1991).

62. 103 S. Ct. 3469 (1983).

63. 567 N.E.2d 1270 (1991); 111 S. Ct. 2261 (1991), cert. denied.

64. 110 S. Ct. 2695 (1990).

65. Id. at note 5, 2701.

66. 496 N.E.2d 699 (Ohio 1986).

67. Scott at 705-09.

68. 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 462 U.S. 1127 (19850

69. Milkovich at 2702, n. 5.

70. See supra pp.5-6 text and accompanying notes.

71. Id.

72. 567 N.E.2d 1270 (1991); 111 S. Ct. 2261 (1991), cert. denied.

73. Judith S. Kaye, Dual Constitutionalism in Practice and Principle, 61 ST. JOHN'S L. REV. 399, 406 (1987).

74. Id.

75. 103 S. Ct. 3469 (1983).

76. Long at 406-07.

77. Immuno at 1275-78.

78. Id. at 1272.

79. Id.

80. Id.

81. Id. at 1273.

82. Immuno, 567 N.E.2d 1270 (1991).

83. Id. at 1273.

84. 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 105 S. Ct. 2662 (1985).

85. Immuno at 1274.

86. Immuno at 1275.

87. Immuno at 1275.

88. Gertz v. Robert Welch, Inc. 94 S. Ct. 2997 (1974).

89. See generally, Kyu Ho Youm, Letters to the Editor and Libel Law: Judicial Interpretations Examined, Paper Presented Before the Law Division of the Association for Education in Journalism and Mass Communication Annual Contention, Boston, Mass. (Aug. 7-12, 1991).

90. Id. at 1275.

91. 475 U.S. 767 (1986).

92. Immuno at 1275.

93. Id.

94. Id. at 1277.

95. Id.

96. Id. at 1277.

97. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. N.Y. CONST. art. I, § 8.

98. Id. at 1277, citing O'Neill v. Oakgrove Construction Inc., 71 N.Y.S.2d 521, 528-29 (Ct. App. 1988). The New York Court of Appeals decision held that nonconfidential photographs taken by journalists in the course of newsgathering and kept as resource material are protected from compelled disclosure by the qualified reporters privilege under the free speech and press provisions of the state and federal constitutions; see also, O'Neill at 521 n.1 (New York "shield law," Civil Rights Law § 79-h, does not apply because it privides unqualified protection only to reporters' confidential sources and materials.

99. Id. at 1278, citing People v. P.J. Video, Inc. 501 N.E.2d 556 (N.Y.1986). See infra, pp. 14-17 text and accompanying notes on methods used to interpret state constitutions. See also, Richard J. Tofel, "Every Citizen May Freely . . . Publish": Protecting the Press Under the New York State Constitution, 40 SYRACUSE L. REV. 1041 (1989) (for a complete analysis of the New York free speech/press provision and a detailed discussion of the two analytical methods, interpretive and noninterpretive).

100. Immuno at 1278. This appears to go directly against the Supreme Court's fact/opinion test in Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990), in which the Court rejected certain contextual analyses as using "labels," e.g., "sports page," to protect defamatory facts masquerading as opinion. This argument is just another layer on the already overlayered fact/opinion analyses existing in state and federal law. The Court in Milkovich really did not say context could not be used, it just wanted the media to know that context is not an automatic "opinion" qualifier. Some facts may appear on an editorial page, although most

statements may indeed be opinion. In Immuno, the statements were in an editor's note explaining the subsequent letter to the editor's history, and in the letter itself -- likely places for opinion to appear, as the New York court recognized.

101. 501 N.E.2d 550 (N.Y. 1986).

102. Immuno at 1278.

103. Id. at 1280.

104. Id. at 1281.

105. Id. at 1282.

106. Id. at 1282 n.6.

107. 501 N.E.2d 550 (1986).

108. Immuno at 1282-86.

109. Id. at 1285.

110. Id. at 1286.

111. Id. at 1287.

112. Id. at 1287.

113. Milkovich at 2702-03.

114. Id. at 1287.

115. Id. at 1289.

116. Id. at 1290.

117. Id. at 1282 n.6.

118. See Pollock at 983-986; Hans E. Linde, E Pluribus -- Constitutional Theory and State Courts, 18 GA. L. REV. 165 (1984).

119. Justice Hans A. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. BALT. L. REV. 379 (1980).

120. Linde, E Pluribus -- Constitutional Theory and State Courts, 18 GA. L. REV. 165, 177-79; and Comment, Interpreting the State Constitution: A Survey and Assessment of Current Methodology, 35 U. KAN. L. REV. 593 (1987).

121. See, e.g., People v. Jackson, 176 N.E.2d 803, 805 (1961); see also Seng article at 93-95, and Taylor v. Dorsey, 19 So.2d 876 (1945) (The Florida Constitution is merely a limitation on power, not a grant of power), DONNA LEE DICKERSON, FLORIDA MEDIA LAW 2 (2nd ed., 1991).

122. See People v. P.J. Video, Inc., 501 N.E.2d 556 (N.Y. 1986). See generally, Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781 (1983).

123. Only six states use just prohibitive language like that used in the First Amendment -- Hawaii, Indiana, Oregon, South Carolina, Utah and West Virginia. See Chart A for free speech and press provision citations. Prohibitive language only should not be a deterrent, however, because the state court can interpret its own constitution any way it sees fit, using non-interpretive elements like case law, state history and tradition to support the interpretation, as was done in Immuno.

124. See infra Appendix A, "Year Constitution Adopted/Ratified."

125. P.J. Video, 501 N.E.2d 556, 560 (1986).

126. N.Y. CONST. art. I, § 8.

127. Tofel at 1049.

128. P.J. Video, 501 N.E.2d at 560 (1986).

129. Michael J. Perry, Interpretivism, Freedom of Expression, and Equal Protection, 42 OHIO ST. L.J. 261, 264-65 (1981).

130. California has gone so far as to incorporate its shield law protecting confidential sources into its free speech and press provision in the state Constitution. CALIF. CONST. art. I, § 2.

131. See Tofel at 1050.

132. See, e.g., Delaware and Florida in state digest section at pp. 20, 22-23._

133. See supra at 7-14.

134. See, e.g., Judge Simons' concurrence in Immuno at 1282-86.

135. See, e.g., Alabama digest at 21-22 text and accompanying notes.

136.See infra text and accompanying notes, 21-22, 24-25.

137. ALASKA CONST., "History of Alaska Statehood," at 11 preceding constitution text in ALASKA STAT., Binder 1.

138. Id.

139."Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." ALASKA CONST., art. I, § 5.

140. See infra CALIF. CONST. art I, § 2, for the longest speech/press provision. It includes the state's shield law for media confidential sources at 29-30 text and accompanying notes.

141. 486 P.2d 925 (1971).

142. 626 P.2d 81 (Alaska 1980).

143. 640 P.2d 818 (Alaska 1982).

144. "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." CONN. CONST. art. I, § 4 (like Alaska's brief provision); "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." CONN. CONST. art I, § 5 (mirrors the First Amendment); "In all prosecutions or indictments for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court." CONN. CONST. art. I, § 6 (standard libel reference, see, e.g., Florida, Delaware, New Jersey, Illinois, Colorado -- citations in Appendix A).

145. N.Y. CONST. art. I, § 8.

146. Christopher Collier, The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition, 15 CONN. L. REV. 87 (1982).

147. 549 A.2d 683 (1987).

148. Id. at 689.

149. 567 N.E.2d 1270 (N.Y. 1991), 111 S. Ct. 2261 (1991), cert. denied.

150. 549 A.2d 1092, 1093 n.1 (1986).

151. 469 A.2d 1201 (Conn. 1984).

152. 592 P.2d 341 (1979), aff'd., 100 S. Ct. 2035 (1980).

153. "The press shall be free to every citizen who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty. In prosecutions for publications, investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury may determine the facts and the law, as in other cases." DEL. CONST. art. I, § 5.

154. Id.

155. 324 A.2d 211 (1974).

156. Id. at 213.

157. "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions of indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact." N.J. CONST. art. I, § 6.

158. See, e.g., Montana, Iowa, Florida, New York. Citations in Appendix A.

159. 423 A.2d 615 (1980).

160. 346 A.2d 66 (1975).

161. Schmid at 625.

162. Schmid at 626-27.

163. N.J. CONST. art I, § 6; see Historical Note following the provision text.

164. See, e.g., Pruneyard Shopping Center v. Robins,, 592 P.2d 341 (1979), reh'g. denied; see also supra Connecticut digest at 18-19.

165. 592 P.2d 341 (1979), aff'd., 100 S. Ct. at 2040, (1980). See also, Note: The Triumph of Federalism: New Jersey Departs from Federal Trends in Libel Law, 36 RUTGERS L. REV. 91 (1983).

166. See supra, pp. 20-21 text and accompanying notes.

167. "That no law shall ever be passed to curtail or restrain the liberty of speech or of the press, and any person may speak, write, and publish his sentiments on all subjects being responsible for the abuse of that liberty." ALA. CONST. art. I, § 4. (Note that Alabama and a number of other states still use sexist male pronouns when referring to the citizens of the state in the singular).

168. N.Y. CONST. art. I, § 8; ALASKA CONST. art. I, § 5.

169. 192 S.2d 261 (1939).

170. 173 S. 626 (1937).

171. 7 Port. 293 (1838).

172. "Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motive, the party shall be acquitted or exonerated." FLA. CONST. art. I, § 4.

173. See, e.g., IOWA CONST. art. I, § 7; N.Y. CONST. art. I, § 8.

174. Commentary, Talbot "Sandy" D'Alemberte, which follows FLA. CONST. art. I, § 4

175. Id. at 89.

176. See, e.g., Taylor v. Dorsey, 19 So.2d 876 (1945); see also, DONNA LEE DICKERSON, FLORIDA MEDIA LAW 2 (2d. ed. 1991).

177. 13 So.2d 704 (1943) (en banc).

178. Id. Woodruff at 705.

179. "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom." LA. CONST. (1974) art. I, § 7.

180. Lee Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 LA. L. REV. 1, 28-29 (1974).

181. TEX. CONST. annotated (1876), see Preamble, Interpretative Commentary at 231.

182. "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." TEX. CONST. art I, § 8, Interpretive Commentary at 304.

183. Id.

184. James C. Harrington, Free Speech, Press, and Assembly Liberties Under the Texas Bill of Rights, 68 TEX L. REV. 1435 (1990).

185. Harrington at 1443.

186. Harrington at 1452.

187. 776 S.W.2d 551 (Tex. 1989).

188. Id. at 1454.

189. Harrington at 1456. See generally for more supportive related protections. See also, Bill Van Wagner, Defamation and Media Defendants in Texas, 34 SW. L.J. (Tex.) 847 (1980).

190. Harrington at 1456.

191. 759 S.W.2d 939, 944 (1988) (The concurrence also cites use of Texas' comparative law -- use of other states' decisions in libel actions, at 943).

192. "The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such a right. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted." Ark. Const. art II, § 6.

193. See historical note before Preamble, ARK. CONST.

194. 598 S.W.2d 745 (1980).

195. "All persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." ILL. CONST. art. I, § 4.

196. Thomas B. McAffee, The Illinois Bill of Rights and Our Independent Legal Tradition: A Critique of the Illinois Lockstep Doctrine, 12 S. ILL. U. L.J. 1 (1987), citing People V. Jackson, 176 N.E.2d 803, 805 (1961).

197. McAffee at 11.

198. cite

199. Michael P. Seng, Freedom of Speech, Press and Assembly, and Freedom of Religion Under the Illinois Constitution, 21 LOY. U. CHI. L.J. 91, 98.

200. "Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted." IOWA CONST. art. I, § 7.

201. Michael A. Giudicessi, Independent State Grounds for Freedom of Speech and of the Press: Article 1, Section 7 of the Iowa Constitution, 38 DRAKE L. REV. 9, 16, (1989), citing Des Moines Register & Tribune Co. v. Iowa Dist. Court, 426 N.W.2d 142 (Iowa 1988).

202. Id., see also, e.g., Des Moines Register and Tribune v. Osmundson, 248 N.W.2d 493, 498-99 (1976). "We believe the federal and state constitutional provisions, which contain almost identical language, impose the same limitation on abridgement of freedom of the press. These constitutional provisions are a general prohibition of prior restraints on publication."

203. See Appendix A for comparisons of a number of interpretive elements among the 50 states.

204. Giudicessi at 21.

205. 328 N.W.2d 920 (1983).

206. Wifvat at 924.

207. Giudicessi at 27; see also, 25-27 for specific citations and discussion of other speech-related cases favorable to the press.

208. 440 N.W.2d 884 (Iowa 1989).

209. Palmer, 440 N.W.2d 884 (Iowa 1989).

210. "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press." MICH. CONST. art. I, § 5.

211. Harold Norris, A "Freedom of Expression" in the New Constitution, Detroit Bar Assn. J. (1964).

212. Maurice Kelman, Foreword: Rediscovering the State Constitutional Bill of Rights, 27 WAYNE L. REV. 413, 415 (1981).

213. 295 N.W 320 (1940).

214. Kelman at 417.

215. "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." ARIZ. CONST. art. II, § 6.

216. 767 P.2d 719 (1988), rev. denied, citing State v. Ault, 724 P.2d 545, 552 (1986).

217. Id. at 721.

218. 811 P.2d 323 (Ariz. 1991).

219. Yetman at 334.

220. Yetman at 334.

221. "(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.
(b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. Nor shall a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in comtempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public. As used in this subdivision, 'unpublished information' includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has geen disseminated." CALIF. CONST. art. I, § 2.

222. See annotation following CALIF. CONST. art. I, § 2.

223. Shield laws are usually separate state statutes, not part of the state constitution free speech provision.

224. See generally, Note, Robins v. Pruneyard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution, 68 CAL. L. REV. 641 (1980); Note, Pruneyard Shopping Center v. Robins: The Expansive Protection of Free Speech in California, 13 U. WEST L.A. L. REV. 171 (1981).

225. 592 P.2d 341 (1979), aff'd., 100 S. Ct. 2035 (1980).

226. See Margaret Crosby, New Frontiers: Individual Rights Under the California Constitution, 17 HASTINGS CONST. L. Q. 81, 81-87 (1989).

227. Pruneyard at 347.

228. Id.

229. Id. at 346.

230. See Jon Sylvester, How California Governs the News Media, 26 SANTA CLARA L. REV. 382, 381-386 (1986).

231. Sylvester at 399.

232. "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact." COLO. CONST. art. II, § 10.

233. 773 P.2d 1059 (Colo. 1989).

234. Id. at 1066. "We have previously stated, and reaffirm today, that our constitution extends broader protection to freedom of expression than does the first amendment to the United States Constitution. See People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348 (Colo. 1985)."

235. 659 P.2d 1351 (Colo. 1983).

236. Id. at 1360. n.4 and accompanying text. The court suggests that the words "in my opinion" or other cautionary "language of apparency" can be a factor in deciding whether statements are fact or opinion, but this would not necessarily be determinative or a "complete shield."

237. Milkovich, 110 S. Ct. at 2705-06.

238. 567 N.E.2d 1270 (N.Y. 1991), 11 S. Ct. 2261 (1991), cert. denied.

APPENDIX A

STATE	Year Constitution Adopted/Ratified	Citation	Affirmative or Prohibitive Language	Mirrors 1st Amend. Text	Is "press" in text?	Is "libel" in text?	Strong emphasis on press freedo
ALABAMA	1901	Ala. Const. art. I, § 4	Both	Part	Yes	Indirect*	Yes
ALASKA	1956 (statehood 1959)	Alaska Const. art. I, § 5	Aff.	No	No**	Indirect*	Moderate
ARIZONA	1910	Ariz. Const. art. II, § 6	Aff.	No	No***	Indirect*	Moderate
ARKANSAS	1974	Ark. Const. art. II, § 6	Aff.	No	Yes	Yes	Yes
CALIFORNIA	1879	Calif. Const. art. I, § 2	Both	Part	Yes	Indirect*	Yes, includ shield law
COLORADO	1876	Colo. Const. art. II, § 10	Both	Part	No***	Yes	Moderate
CONNECTICUT	1965	Conn. Const. art. I, § 4	Aff.	No	No***	Indirect*	Moderate
DELAWARE	1897	Del. Const. art. I, § 5	Aff.	No	Yes	Yes	Yes (Speech not in text)
FLORIDA	1885 (1968 Revision)	Fla. Const. art. I, § 4	Both	Part	Yes	Yes "Defamation"	Yes
GEORGIA	1982	Ga. Const. art. I, § 1 Para. 5	Both	Part	Yes	Indirect*	Yes
HAWAII	1949 (1978 Revision)	Hawaii Const. art. I, § 4	Prohib.	Yes	Yes	No	Moderate

STATE	Year Constitution Adopted/Ratified	Citation	Affirmative or Prohibitive Language	Mirrors 1st Amend. Text	Is "press" in Text?	Is "libel" in Text?	Strong Emphasis on Press Freedom?
IDAHO	1889	Idaho Const. art. I, § 9	Aff.	No	No**	Indirect*	Moderate
ILLINOIS	1970	Ill. Const. art. I, § 4	Aff.	No	No**	Yes	Moderate
INDIANA	1851	Ind. Const. art I, § 9,10	Prohib.	Yes	No**	Yes	Moderate
IOWA	1857	Iowa Const. art. I, § 7	Both	Part	Yes	Yes	Yes
KANSAS	1859	Kan. Const. Bill of Rights § 11	Aff.	No	Yes	Yes	Moderate
KENTUCKY	1891	Ky. Const. Bill of Rights § 8	Both	Part	Yes	Indirect*	Yes
LOUISIANA	1974	La. Const. art. I, § 7	Both	Part	Yes	Indirect*	Yes
MAINE	1983	Maine Const. art. I, § 4	Both	Part	Yes	Yes	Yes
MARYLAND	1867	Md. Const. Decl. of Rights art. 40	Aff.	No	Yes	Indirect*	Yes
MASSACHUSETTS	1780	Mass. Const. Pt. 1, art. XVI (rev. 1948 to add "speech"	Both	Part	Yes (only press until 1948)	No	Yes

MICHIGAN	1963	Mich. Const. art. I, § 5	Both	Part	Yes	Indirect*	Yes
MINNESOTA	1857 (restructured 1974)	Minn. Const. art. I, § 3	Aff.	No	No***	Indirect*	Yes
MISSISSIPPI	1890	Miss. Const.. art. III, § 13	Aff.	No	Yes	Yes	Yes ("sacred")
MISSOURI	1945	Mo. Const. art. I, § 8	Both	Part	No**	Yes	Yes
MONTANA	1972	Mont. Const. art. II, § 7	Both	Part	No***	Yes	Yes
NEBRASKA	1875	Neb. Const. art. I, § 5	Aff.	No	No***	Yes	Moderate
NEVADA	1864	Nev. Const. art. I, § 9	Both	Part	Yes	Yes	Yes
NEW HAMPSHIRE	1783	N.H. Const. art. I, § 22	Aff.	No	Yes	No	Yes (speech added 1968)
NEW JERSEY	1947	N.J. Const. art. I, § 6	Both	Part	Yes	Yes	Yes
NEW MEXICO	1911	N.M. Const. art. II, § 17	Both	Part	Yes	Yes	Yes
NEW YORK	1938	N.Y. Const. art. I, § 8	Both	Part	Yes	Yes	Yes

NORTH CAROLINA	1970	N.C. Const. art. I, § 14	Both	Part	Yes	Indirect*	Yes
NORTH DAKOTA	1889	N.D. Const. art. I, § 4	Aff.	No	No	Yes	Moderate
OHIO	1851	Ohio Const. art. I, § 11	Both	Part	Yes	Yes	Yes
OKLAHOMA	1907	Okla. Const. art. II, § 22	Both	Part	Yes	Yes	Yes
OREGON	1857 (statehood 1859)	Ore. Const. art. I, § 8	Prohib.	Yes	No***	Indirect*	Yes
PENNSYLVANIA	1873	Pa. Const. art. I, § 7	Both	Part	Yes	Yes	Yes (extensive wording)
RHODE ISLAND	[illegible]	R.I. Const. art. I, § 20 art. I, § 21	Aff.	No	Yes	Yes	Yes (separate speech and press §§)
SOUTH CAROLINA	1895	S.C. Const. art. I, § 2	Prohib.	Yes (includes assembly and petition)	Yes	No	Moderate
SOUTH DAKOTA	1889	S.D. Const. art. VI, § 5	Aff.	No	No	Yes	Moderate
TENNESSEE	1870	Tenn. Const. art. I, § 19	Both	Part	Yes	Yes	Yes
TEXAS	1876	Texas Const. art. I, § 8	Both	Part	Yes	Yes	Yes

UTAH	1896	Utah Const. art. I, § 15	Prohib.	Yes	Yes	Yes	Moderate
VERMONT	1793	Vt. Const. ch. 1, art.XII	Both	Part	Yes	No	Yes
VIRGINIA	1971	Va. Const. art. I, § 12	Both	Part	Yes	Indirect*	Yes
WASHINGTON	1889	Wash. Const. art. I, § 5	Aff.	No	No	Indirect*	Moderate
WEST VIRGINIA	1872	W.Va. Const. art. III, § 7	Prohib.	Yes	Yes	Yes (re: damages)	Moderate (obscenity restraints)
WISCONSIN	1848	Wis. Const. art. I, § 3	Both	Part	Yes	Yes	Yes
WYOMING	1890	Wyoming Const. art. I, § 20	Aff.	No	No	Yes	Moderate

* Text refers to "abuse" of freedom of speech and/or press

** Text title refers only to speech, not press

*** Text title refers to press and speech

Inquiring Minds Have a *Right* to Know: The Role of Tautology in Private Facts Cases

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> The 'public wants to know' something or other which it has no earthly right to know, or even to feel curious about; and before that unrighteous claim every wall is to go down and every veil to be lifted.[1]

I.
INTRODUCTION

The First Amendment has become deified as "the cornerstone of a free society," and "the foundation of an informed public."[2] But along with speech that is necessary for a fully functioning democracy and a somewhat cohesive community, the First Amendment also protects speech that may be sensationalist and oppressive[3] -- including speech that encroaches on the individual's desire for privacy. The legal collision of these two fundamental concerns has produced a muddled history of litigation and a somewhat baffling pool of rhetoric.

This paper wades through that litigation and rhetoric, focusing primarily on what has become known as "the newsworthiness defense," a concept often invoked by courts in defense of the news media after they have been sued for the publication of private facts. If the matter published is "newsworthy," the theory goes, it is protected under the First Amendment. With the advent of the concept of newsworthiness, which probably occurred in 1940, in the case of *Sidis v. F-R Publishing*, the effort to define the right to privacy was, to a large extent, abandoned. Since that time, judges generally have refused to define or to determine what is newsworthy, leaving it up to editors to do that (it being their job to do so). As Judge Clark decided in *Sidis*:

> Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest....And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.[4]

Judge Clark suggests that whatever editors determine to be news is, in fact, newsworthy, *because* editors decided to publish it. This renders the newsworthiness defense a tautology. To ignore the potential abuse in this is to take a very charitable and somewhat naive view of human nature.[5]

In the legal arena, such reliance on the tautological newsworthiness defense has suggested, in the words of Western Illinois University professor Deckle McLean, that "privacy can be defended only at the risk of threatening the media's freedom to report on public discussion."[6] The development of the newsworthiness defense and its reified status make it the crux of this type of litigation. As happens all too often, the rhetoric in private facts cases has come to define the issues, instead of the other way around.

Late in 1989, writing for the court in *Cape Publications v. Hitchner*, Florida Supreme Court Justice Shaw took special note of the power of the newsworthiness defense:

> The developing law surrounding the private-facts tort recognizes that the requirement of lack of public concern is a formidable obstacle. In fact, the 'newsworthiness' defense has been recognized by commentators as being so broad as to nearly swallow the tort.[7]

If this is true, to what extent has the newsworthiness defense come to dominate court opinions in favor of media organizations? A cursory examination of the evidence shows that the media most often prevail over the individual in cases brought under the private facts tort. What is not immediately clear, though, is whether the newsworthiness defense lies at the heart of this overwhelming success rate. For this paper, a review of private facts cases to date was undertaken to discover the precise nature of the newsworthiness defense, how it is defined by the courts and the extent of its domination.

Such an analysis should sharpen definitions and illuminate possible inconsistencies, ultimately providing a better understanding of issues involved in this type of conflict. A better understanding of what's at stake can only serve to better inform and assist judges and policy makers in future decisions involving the disclosure of private facts in the news media.

As E.L. Godkin wrote in an 1890 essay: "...love of gossip is after all human."[8] And it always will be. But the issue is whether this love of gossip, this desire to know rather personal and embarrassing information about others, *constitutes* a "right to know" that may be given unconditional protection under the First Amendment (often represented in private facts cases by the concept of "newsworthiness") -- even when the wide dissemination of certain information may injure an individual emotionally and psychologically.

Specific research questions are stated in a section to follow. But first, to view the conflict in some historical context, the first part of the paper briefly reviews the development of the concept of privacy and its clash with the values embodied in the First Amendment freedom of speech and press. Description of the research and findings follow. The research results, focusing on the *judicial* reaction to a relatively new conflict, which has evolved in the courts -- and in society -- over the past century, lead to questions about how the conflict is currently resolved in the courts and especially whether the balance may rest on a faulty conceptualization of the newsworthiness defense. These issues are discussed in the concluding section.

II.

HISTORICAL DEVELOPMENT OF THE RIGHT TO PRIVACY

For more than a century, proponents of a right to privacy have struggled for its recognition in the law. Their efforts have been moderately successful. The right to privacy is said to have been first recognized as a "constitutional" right by a Michigan judge in 1870.[9] Although the right to privacy is not spelled out explicitly in the Constitution, penumbrance for it has been found by the courts in the First, Third, Fourth, Fifth and

Ninth Amendments. All but a few states now recognize some form of a right to privacy in their statutes.

Although 1860 has been cited by at least one judge as the year in which the first article appeared concerning the right to privacy,[10] the most influential article on the subject appeared in 1890.[11] Written by Samuel D. Warren and Louis D. Brandeis, the article appears to have been largely an attack on the intrusiveness of the press. Although their argument was for a chiefly emotional right, Warren and Brandeis attempted to construct it out of past litigation dealing with property rights and assault.[12] Out of this, they built a fairly solid foundation for recognition of the "the right to enjoy life -- the right to be let alone," the protection of the "intangible, as well as tangible."[13]

Prior to 1890, cases decided on some sense of a right to privacy turned largely on a "right of property or a breach of trust or breach of confidence,"[14] and generally did not use the word "privacy" to describe the concept they protected. In *DeMay v. Roberts*,[15] an 1881 Michigan case cited by Warren and Brandeis, Judge Marston mentions a "right to privacy," but refers to the right of a woman to the privacy of her apartment during childbirth -- an argument against trespass and one based on property rights, not the "recognition of man's spiritual nature, of his feelings and his intellect," as called for by Warren and Brandeis nine years later.[16]

Concentrating largely on invasions of privacy by the press, the two laid out six rules, or limitations, to define the scope of the right they were proposing:

> 1) The right to privacy does not prohibit any publication of matter which is of public or general interest.
> 2) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it privileged communication according to the law of slander and libel.
> 3) The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.
> 4) The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

5) The truth of the matter published does not afford a defence.
6) The absence of "malice" in the publisher does not afford a defence.[17]

As noted by at least one scholar in 1929, the first limitation is perhaps the most misunderstood and diversely interpreted of all six.[18] Almost 40 years after the article was published, University of Michigan professor George Ragland Jr. wrote that some judges may have taken this distinction to bounds unpredicted and unintended by Warren and Brandeis, especially in drawing a public/private distinction in these cases. He wrote that it is "the 'public interest' in the matter published rather than the fact that it is published about a so-called public character which invests the case with immunity from violating the right of privacy."[19]

Misinterpreted or not, the right to privacy has had a less than distinguished legal evolution. In many ways, there is no clearer idea of what is meant by privacy today than there was 90 years ago when someone noted for the *Columbia Law Review*:

> The feeling that everyone has a right to a certain amount of privacy in his life is widespread. As to the extent of the right, however, this feeling is indefinite....Everyone claims an antagonistic right to know some things about his fellow, things which are important for him to know politically, or in connection with business, and other things which interest him with merely a human interest.[20]

The statement reflects a frustration well-documented in writings of the day. Initially, much of the anger was directed at "'kodakers' lying in wait" to take -- and subsequently publish -- photographs.[21]

Godkin recognized that the right to choose for oneself how much one's neighbors shall know or see of one's private life is "the outward and visible sign of the law's respect for his personality as an individual."[22] The "chief enemy" of that cherished right, he said, is the kind of "interest in other people and their affairs known as curiosity," which the advent of newspapers "has converted...into what economists call an effectual demand, and gossip into a marketable commodity."[23] It soon became clear that, as one writer noted in the New York Tribune a year later, people would not "consent forever to live under the microscope, especially when half those who use it value it only for the purpose of gaining money by human vivisection."[24]

Tested repeatedly in the courts after the Warren and Brandeis essay, the right to privacy was most commonly called upon to defend individuals who felt they had suffered "mental distress and annoyance" because of the unauthorized reproduction and publication of their names and/or likenesses. The most influential decision of this type was handed down in 1902 in New York, in *Roberson v. Rochester Folding Box Co.*[25] Until 1902, New York courts apparently had been following a course toward full recognition of the right to privacy. But the *Roberson* case not only helped put a new law on the books in the state of New York, it apparently also changed the course of the development of the right to privacy.

In the *Roberson* case, a New York court of equity decided an injunction could not be granted to restrain the publication, without consent, of a young woman's picture as part of an advertisement. Writing the opinion for the court, Judge Parker based the decision largely on a lack of precedent, finding that an emotional right to privacy (as opposed to one present only in the rights one has to one's own property) did not exist in a New York court of equity. So apparently outraged were some of the more influential people of the community, that a statute was shortly thereafter passed in New York prohibiting the publication, without consent, of any person's name or likeness for purposes of trade.[26] With the introduction of the New York statute prohibiting the publication, without consent, of an individual's name or likeness for purposes of trade, it appeared the right of privacy would eventually receive full recognition. But, as suggested by Ragland in a law review article thirteen years later, this legislation allowed lawmakers and judges alike to feel as though they had finally solved this "problem" of the right to privacy, giving rise to the "false impression that this constituted exclusively the right to privacy."[27]

Perhaps partially as a direct result of the *Roberson* case (and other similar cases during roughly the same period), privacy became interwoven with rights that existed already, but which may have been so strictly based on property rights as not to allow for recovery in the area of me~~ntal and em~~otional injury.[28] Had it not interfered, then, Ragland argued, there may have been "an orderly growth and development of the doctrine within the common law rather than without."[29] The privacy torts of intrusion, false light and misappropriation, of course, were not explicitly laid out until 1960, in an article by University of California--Berkeley Law School Dean William L. Prosser.[30] It has been asserted by University of Iowa law professor Dorsey D. Ellis Jr. that these three torts are actually "offspring from the wrong side of the blanket, scions of meretricious liasons between privacy and the torts of trespass, defamation and trademark infringement."[31] For this reason, the private facts tort has come to be known as "pure privacy." Recognition of privacy under this tort likely still has not reached maturity.

But it has taken on a different texture, in two senses. For one, as is shown in a later section of this paper, the emphasis in the courts is no longer on the determination of whether there has been an injury. The emphasis has shifted to a determination of whether society has a right to know about the matter which caused the supposed mental and/or emotional injury. And secondly, information has become an increasingly valuable commodity. To have information is to have power, or at the very least, advantage. Surely, with the pressure to sell news product comes the temptation to use whatever titillating information may be at one's disposal. Fairly recent developments, such as increasingly invasive technology and the focus of public attention on such popular issues as the "outing" of homosexuals and the publishing of the names of crime victims -- especially victims of rape or sexual harassment -- can only serve to intensify interest in the debate.

III.

DISSECTING "NEWSWORTHINESS:" A CASE STUDY

Harvard law professor Arthur Miller suggested in 1978 that perhaps the judgment of editors as to what is newsworthy should not be "beyond scrutiny," and should be "balanced against other social considerations" because, he wrote, "[l]oss of privacy is loss of dignity,"[32] and "'interesting' is not synonymous with 'newsworthy.'"[33] Clearly, the tautology of the newsworthiness defense has made it a very strong shield for the media. But what, exactly, is "newsworthy?" What is the nature of the defense? How is it defined? And what does it really protect?

In an attempt to answer several questions about the newsworthiness defense, 745 reported cases were examined. The analysis focused on the *extent* to which newsworthiness has been used in private facts cases, and on the concept's meaning as used in the decisions. Of foremost interest are the following questions:

- Approximately what percentage of cases has been decided in favor of the news organization pitted against the individual and his or her claim for privacy?
- Of the cases decided in favor of the media, how many have rested *solely* on the newsworthiness defense?
- How many have rested *primarily* on the newsworthiness defense?
- How many have rested primarily on some other defense, while still having *mentioned* that the matter in question was newsworthy?
- How many decisions have made *no mention* of newsworthiness at all?
- In how many of the cases decided for the *individual* was the newsworthiness defense specifically mentioned as having been "*overridden*" by other considerations, and what were they?
- What part does tautologous reasoning play in these decisions? How many involve such reasoning? How many cases employing the rhetoric of "newsworthiness" also employ a tautological argument?
- How do the courts define "newsworthiness"? Is there any evidence to suggest that the meaning has changed over time?
- And finally, to what extent have judges taken on the role of determining what is and what is not "news"? Is there any particular element they routinely find necessary to determine that the matter published was, in fact, newsworthy?

To address these questions, several terms need to be defined. For cases to be won by the plaintiff bringing action in private facts cases, three criteria must be met:[34] the publication must be a public disclosure; the facts in question must be private in nature and previously unknown to the population to which they were disclosed;[35] and the facts must be "offensive and objectionable to a reasonable person of ordinary sensibilities."[36]

The first criterion, unlike the other two, was absorbed into the selection process to determine which of the cases examined were eligible for inclusion in the study data. Because this study was specifically designed to examine the newsworthiness defense, it concerns only cases in which there has been a *wide dissemination* of the private matter in question. Therefore, if a court determined the facts in question in a given case were not "widely disseminated," the case was not included in this study.

Also, the third criterion mentioned above -- that the published matter be "offensive and objectionable to a reasonable person of ordinary sensibilities" -- is very closely tied to newsworthiness. In fact, it seems that inoffensiveness is often implied by a decision that the printed matter was, in fact, newsworthy. In other words, although not specifically stated this way, the reality may be that matter which is offensive is, by definition, *not newsworthy*.[37]

In addition, in an effort to make the study more meaningful and manageable, included in the study were only those cases in which the courts *could have used* the newsworthiness defense if they so chose. Certain kinds of publications, then, were also excluded from inclusion in the case study; i.e., excluded were any works that were fictionalized or satirical,[38] publications involving libelous facts,[39] photos or articles in which the plaintiff is unidentifiable and articles or facts that were never published and/or were enjoined prior to publication (as this study does not touch on prior restraint). Because this study set out to examine what happens when the news media are pitted against the *individual* in private facts cases, excluded from the study were also cases in which a corporation acted as plaintiff. Cases simply remanded to the trial court for further proceedings, without pronouncement on either newsworthiness or the right to privacy, were also excluded from the case study.

Use of these criteria eliminated many of the examined cases from inclusion in the study data. While 745 cases were examined, only 114 of these cases met the qualifications for inclusion in the case study itself.[40]

IV.

THE FINDINGS: UNTANGLING THE WEB

The earliest case found to conform to the conceptual boundaries of this study was decided in the state of Washington in 1911,[41] and the most recent was decided in Florida in February of 1991.[42] The bulk of the decisions included in the study -- about 82 percent -- was handed down in the '50s, '60s, '70s and '80s. A table broken down by decades and showing the complete quantitative distribution and classification of the decisions is presented in Appendix A.

There is some difficulty in speculating about why so few cases before the '50s were found. Though every effort was made to make this study as complete as possible, the cases examined may represent only those most often cited, thereby ignoring cases which are, for one reason or another, seen as less significant by the courts, although they may have qualified for inclusion in the study. Or perhaps the number of cases is skewed toward the more recent decades because of the use of the *Media Law Reporter* as a source, since it reports *primarily* on cases brought since the commencement of its publication in 1978.

It is also possible that there is simply an upward trend in the number of cases actually being brought under this tort.[43] The data for this study show a steady increase in the number of cases reported, culminating in 40 brought during the '80s. The '90s already report 8 cases. If such a trend exists, it could be the result of a recent increase in public concern about privacy[44] and outrage at a perceived increase in the news media's invasion of individual privacy.[45]

In any case, the data indicate that the news media do, in fact, have the upper hand in these decisions. Decisions favoring the news media clearly dominate. Of the 114 cases examined, 108 -- about 95 percent -- were decided in favor of the media. There further seems to have been a bit of an upward trend in the percentage of cases decided for the media during each decade.

Although newsworthiness was mentioned in all six of the cases decided for the plaintiff, only two held that the plaintiff's right to privacy was more important *even though* the matter in question was determined to be newsworthy. In *Patterson v. Tribune Co.*,[46] the court decided that the overriding concern was that the information obtained and printed was supposed to be private by statute. However, in *Nappier v. Jefferson Standard Life Insurance Co.*,[47] a rape victim's right to privacy was simply held to override the interests of the newspaper in publishing the victim's name, even though it was technically part of the public record. In the other four cases decided for the plaintiff, the information was held to be explicitly *not* newsworthy -- two of these cases involved indecent exposure, one involved the name of a rape victim and the other involved the publication of a private debt.[48]

It is important to note that *Patterson* and *Nappier* -- both decided in the '60s -- seem to be inconsistent with the more recent rulings handed down by the Supreme Court in *Cox v. Cohn*[49] (in 1975) and *The Florida Star v. B.J.F.*[50] (in 1989). In fact, all rulings concerning the publication of a rape victim's name since *Cox* declare the media victor because of the newsworthiness of trial proceedings in general. With *Patterson* and *Nappier* essentially thrown out, it now appears that any case in which the matter given publicity is explicitly held to be newsworthy or to be of legitimate public concern will result in a victory for the media.

But is the newsworthiness defense behind it all, as Judge Shaw would apparently have us believe?[51]

Before presenting the rest of the results from the case study, the imprecise nature of the newsworthiness defense merits further discussion. The most effective way to clarify its meaning would appear to be through the juxtaposition of the newsworthiness concept and the concept that essentially served the same purpose in private facts decisions before the 1940 *Sidis* case -- "legitimate public concern."

A closer examination of the rhetoric employed in the cases included in this study shows that -- contrary to initial suspicions -- there is, in fact, no distinction between "legitimate public concern" and "newsworthiness." The phrase "legitimate public concern" has been used to protect the same types of information which newsworthiness has been used to protect. Furthermore, that "newsworthiness" is a tautology is not a characteristic which necessarily distinguishes it from "legitimate public concern," for, the latter has also been used *in tautological arguments* defending the media -- arguments which assume the information in question is news because the defendant (a member of the news media) has published it, thereby having determined it to be, in fact, news.

For instance, in the case of *Jenkins v. Dell Pub. Co.*, a case involving the publication of the photo of a widow and children of a man who had been brutally kicked to death, the court decided that "news" is current events that are "likely to be of public interest."[52] The court went on to note that some people are attracted to "shocking news," that others are "titillated by sex in the news," but that "it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged."[53] Here, the court not only has decided that editors *alone* determine what is or isn't "news," but also has decided that this editorial judgment is beyond scrutiny. Did the editor of the newspaper in this case print something that was *not* newsworthy? No. Why? Because the editor determined the published matter *was* newsworthy (hence its publication), and his or her judgment is impervious to reproach. In essence, the defendant is "not guilty" because he or she said so. The *Jenkins* case, then, is an example of one which employs tautology.

Further, because of the close link between offensiveness and newsworthiness, also included in the author's definition of tautology in private facts cases are those arguments in which judges claim they cannot decide what is acceptable to the community and what is not, leaving it to editors to test the outer bounds of decency and to decide what the public will tolerate; in essence, to decide what the public is interested in. These types of arguments focus on the question of whether the public is interested in what was published, without really considering the legitimacy of that interest.[54]

The finding that both "newsworthiness" and "legitimate public concern" were used in connection with tautological reasoning prompted further examination of the cases in the study, with an eye toward reasoning instead of rhetoric, searching for tautological arguments in addition to the terms "newsworthiness" and "legitimate public concern." See table in Appendix A.

There *does* seem to be a real difference in the way in which cases were approached before and after 1940. Newsworthiness appears to play a role in that it has become a catch phrase which places emphasis on the media's representation of the public's supposed right to know instead of the individual's right to privacy. As the table in Appendix A indicates, none of the cases in this study that were decided before the 1940 *Sidis* case were found to have employed tautological reasoning. Since 1940, almost a third of the cases decided for the media have used some sort of tautology to justify protection of the publication in question. Of those, 75 percent were decisions resting solely or primarily on "newsworthiness" or "legitimate public concern."

About 60 percent of all cases decided for the media rested solely or primarily on "newsworthiness" or "legitimate public concern." Of these cases, about 35 percent used a tautological argument in defense of the media. About half of cases resting solely on "newsworthiness" or "legitimate public concern" employed tautological reasoning. But in cases in which judges decided that "newsworthiness" or "legitimate public concern" were only of secondary importance in coming to their decisions -- about 21 percent of the cases studied -- only one fourth employed tautological reasoning.

Furthermore, a fairly substantial number of cases decided for the news media -- about 19 percent -- made absolutely no explicit reference to "newsworthiness" or "legitimate public concern." As is indicated at the bottom of the first page of the table in Appendix A, only one of these cases employed tautological reasoning.

Finally, fully 96 percent of cases using tautological reasoning to defend the news media made explicit reference to "newsworthiness" or "legitimate public concern." Statistically, there appears to be some correlation between the use of tautology and the use of the rhetoric of "newsworthiness" and "legitimate public concern." The flag waving rhetoric that has accompanied the "newsworthiness" defense from the defense's inception in *Sidis v. F-R Publishing* was not present in decisions before 1940. None of the decisions found for inclusion in this study rested on the powerful and loaded phrases "freedom of the press" and the "right to know" before 1940. And none of them employed a tautology in defense of the news media. The concentration was neither on the right to know nor on the right to publish, but on whether the individual had a right to privacy in the instant case. The center of the debate, in other words, was on the other side of the equation -- on the individual's claim to privacy.

For instance, in *Hillman v. Star Publishing Co.* in 1911, the Washington Supreme Court decided there would be no punishment for the publication of the photograph of a woman whose father had been accused of fraud. Nowhere in its opinion did the court say the newspaper had a right to print the photograph. Nor did it say the newspaper did *not* have that right. The opinion only addressed the complaint of the plaintiff. In fact, the opinion read: "A wrong is admitted, but...there is no remedy." Remedy could not exist, said the court, because in the absence of a statute, the court could not determine whether the plaintiff was a "public character,"[55] and therefore whether she had a claim to privacy. The right to privacy was the focus, not the right to publish.

The cases studied also reveal a growing willingness on the part of judges to draw fine lines and to decide for themselves what was news and what wasn't before the *Sidis* decision. Handed down in 1936, the decision in *Sweenek v. Pathe News* typifies this type of judicial approach to private facts litigation just before 1940. The court, while admitting it may be difficult to determine where to draw the line between privacy and public interest, did so anyway. Though its conclusion was hopelessly sexist, the court *did* distinguish what was news and what wasn't. In the opinion, Judge Moscowitz wrote that "pictures of a group of corpulent women attempting to reduce" do not cross the line at which the public interest ends, "at least so long as a large proportion of the female sex continues its present concern about any increase in poundage." He added that the "amusing comments which accompanied the pictures did not detract from their news value."[56]

Although the focus in *Metter v. Los Angeles Examiner* was on whether the plaintiff had a claim to privacy where the publication in question concerned his deceased wife, the court still attempted to emphasize the importance of distinguishing between "public or general interest" and "mere curiosity."[57] And too, in *Sarat Lahiri v. Daily Mirror Inc.*, the New York Supreme Court attempted to determine whether or not the photograph in question had "so tenuous a connection with the article that it can be said to have no legitimate relationship to it."[58]

Though not entirely non-existent, efforts by the courts to determine what is "news" are not as common in decisions since the 1930s. In fact, the courts generally have been very straight-forward recently in saying they explicitly *should not* decide what is news and what isn't. The Supreme Court, in *Cox v. Cohn*, declined to pass judgment on the newsworthiness of the publication of the name of a rape victim, saying that "reliance must rest upon the judgment of those who decide what to publish or broadcast."[59] And resting its decision partially on *Sidis*, a New York appellate court, in 1958, said that "a cursory examination of the contents of some of our daily newspapers makes evident that such [lurid] stories are part and parcel of the reading habits of the American public. We cannot undertake to pass judgement on those reading tastes."[60]

A 1982 case employing "legitimate public concern" terminology was an exception to this rule. The court stated explicitly the opposite: "Once the Court determines that the matter is an event of public concern, the publication is *per se* not an invasion of privacy."[61] The court then proceeded to determine the legitimacy of the public's concern about the event which precipitated publication of the matter in question -- not the legitimacy of the public's interest in the matter itself.[62] The matter in question was a man wearing only underwear, shown on a television newscast. The event which precipitated publication of this matter was the man's arrest for shooting a police officer and holding a boy hostage. The court concluded that the report was protected because criminal activity is of legitimate concern to the public, thereby setting up an inconsistency in what is examined for legitimacy of interest and what is examined for offensiveness, whereas the two ought to be one in the same.

In another case employing the "legitimate public concern" terminology, the court asserted that "publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims"[63] -- editors, in other words, are permitted to publish whatever they think the public wants to know and call it "news."

Further support of this suggestion is found in the recent unequivocal protection of the newsgathering process itself. In the 1989 Florida decision of *Cape Publications v. Hitchner*, the court concluded that the "right to know assumes special importance where judicial proceedings are concerned."[64] The case involved a couple acquitted of child abuse charges. After the trial, the reporter acquired a document containing comments made by the child in a pretrial interview. A Florida statute provides that such records are confidential and that anyone who "knowingly and willfully makes public or discloses any confidential information contained in the...records of any child abuse or neglect case"[65] is guilty of a second degree misdemeanor. In spite of the explicit wording of the statute, the court in *Cape v. Hitchner* decided the law had *not* been violated because the reporter had obtained the files from the prosecutor's secretary. In other words, the reporter broke no laws to *obtain* the information; therefore, publication of the information was not a misdemeanor -- explicit protection of the right to publish as a result of a legal newsgathering process.

Similarly, in *The Florida Star v. B.J.F.*, in which, recall, a newspaper published the name of a rape victim in apparent violation of state statute, publication was defended by the court *because* the information in question was not obtained illegally. Because the word "confidential" was not stamped right on the information, the Court decided, the reporter had a right to copy it down, *despite* signs posted nearby noting explicitly the illegality of publishing this type of information.[66]

And in *VanStraten v. Milwaukee Journal*,[67] a Wisconsin court of appeals rejected an inmate's claim for privacy when his AIDS diagnosis and sexual preference were disclosed in violation of a state statute which restricted the disclosure of such information. Aside from requiring health care providers to keep such information confidential, the statute provides that further disclosure of such test results obtained in spite of the law is also prohibited. However, the appellate court decided that, since the newspaper did not obtain the information from health care providers, it was not prohibited from subsequently disclosing the information.[68]

The courts do seem to have set one standard by which to measure the newsworthiness of published matter itself, however. Generally, information contained in a public record is fair game. At least 60 percent of private facts cases are brought because of the publication of sensitive information that is technically part of the public record. In fact, in *Poteet v. Roswell Daily Record Inc.*, the court specifically stated that the "incident was a matter of public record and was *therefore* newsworthy."[69] [emphasis added]

To summarize, the decisions included in this study span the last 80 years, a majority having been decided in the last 40 years. In the early decades of this century, it seems the courts first struggled to define "pure privacy" in the context of the cases which came before the courts. Gradually, their attention turned to the newsworthiness of the matter in question. At first, this resulted in an attempt, by judges, to draw lines between what was legitimately of public interest and what was still considered private. In trying to establish these distinctions, the courts relied on a number of "rules." The rule most relied upon became the general rule that what is a matter of public record -- for the most part, at least -- cannot be considered private. Finally, "newsworthiness" *per se* was introduced to the legal lingo in these cases, and with it, the use of tautologous argument to defend the media. The gradual shift in emphasis to the right to know, as opposed to the right of privacy, was complete. Along with that shift came an apparently unconditional protection of the newsgathering process.

It was well put by Supreme Court Justice White, then, that after a brief glimmer of hope for the development of the right to privacy in the beginning of this century, "the trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information."[70]

V.

CONCLUSION -- WEEDING THE GARDEN

On the face of it, placing an exceptionally strong emphasis on the First Amendment in a struggling democracy doesn't sound all that bad. In fact, it sounds noble and patriotic. Maybe it is. James Madison thought so near the end of the 18th century:

> Perhaps it [the absolute liberty of the press] is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk [of democracy] without wounding vitally the plant from which it is torn.[71]

It is clear, from the text of recent privacy decisions, that the controlling influence of newsworthiness has led many judges to assume that the interests of a democracy are in every case served when the First Amendment is held protected over privacy interests. Furthermore, it is simply assumed that the First Amendment is, in fact, protected by the decisions in these cases.

But is it? Exactly what is being protected? Further, does it matter *how* it is protected?

Perhaps James Madison had the wrong metaphor. Maybe the First Amendment is not a shoot on the stalk of democracy. Perhaps it is instead a garden, whose fruits will feed and nourish democracy. Could it be that judges have been so preoccupied with reaping the harvest of the First Amendment that they have forgotten to weed the garden? The tautology of argument that newsworthiness has brought to private facts litigation threatens to thwart not only the development of the privacy tort, but also, in some sense, the respect given the First Amendment.

In *Doe v. Sarasota-Bradenton Florida Television* in 1983, Judge Campbell attempted a bit of a distinction between what is newsworthy and what is not:

> The judgment of what is newsworthy must remain primarily a function of the publisher. However,...this discretion or judgment of the publisher cannot be absolute. The curiosity and voracious appetite of the public for scandal would be too easily exploited by unscrupulous publishers.[72]

However, Judge Campbell added that "[o]nly in cases...where no legitimate interest exists should a court substitute its judgement for that of the publisher."

But what sort of interest is legitimate? One solution to this problem of definition has been offered by Gary Hebert, editor of *The Iberville South*, the newspaper involved in the *Roshto v. Hebert* dispute. In this case, three brothers brought suit against a newspaper in Louisiana for an article, originally printed in 1952, which was reproduced in 1973 as part of a regular feature called "Page from Our Past."[73] The article told of the conviction of the brothers on a cattle theft charge. After their conviction, the brothers served their prison sentences, were completely rehabilitated and granted full pardons, and had subsequently become law-abiding and hard-working citizens, their past supposedly forgiven and forgotten. The Supreme Court of Louisiana, even after explicitly recognizing that the brothers' names had not been "blocked out" upon republication of the front page from 1952, rendered judgement for the newspaper. The information was true, it said, and it was a matter of public record.

After it was all over, Hebert explained his side of the story in a media law newsletter. Therein, he defined his idea of "legitimate public concern:"

> There is hardly a day goes by that someone doesn't ask me when I will start putting out "Pages from Our Past" again....The Supreme Court [of Louisiana] said that information contained on randomly selected front pages of former editions of a newspaper is certainly a matter of legitimate public interest. The people of this community told me this long before the Supreme Court got around to it. I know what tremendous enthusiasm anticipated those "Pages from Our Past," because I live with the people of this community, and they tell me.[74]

Is this how legitimate concern ought to be defined -- by how eagerly and enthusiastically the public anticipates or receives a given "news" item? Under a tautologous defense, this is essentially how it *is* defined.

Returning to the *Sidis* case we note that, not only did it introduce "newsworthiness" and tautological reasoning to these cases, but it also set up a special link between tautology, newsworthiness and some sort of "right to know." While it is true that *Sidis* was brought under a cause of action that directly addressed a right to publish, reasoning used to defend that right to publish went like this: "Everyone will agree that at some point, *the public interest in obtaining information* becomes dominant over the individual's desire for privacy." [emphasis added] And later, in discussing "news worthiness," the opinion of the court was that "[r]egrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the *mores* of the community, it would be unwise for a court to bar their expression in the newspapers, books and magazines of the day."

The arguments used to defend the newspaper's right to publish clearly set up a link between "news worthiness" and "the public interest in obtaining information," which, for all practical purposes becomes, in a very real sense, a "right to know" about certain things *because* -- and only because -- "such are the *mores* of the community." And who determines what those mores are? Editors -- because that's what they do for a living.

In spite of insistence to the contrary, the public's right to know is not protected with the newsworthiness defense. In a capitalist society, news organizations are businesses with a need for revenue, most of which comes from advertising dollars. So through defense of a right to publish, courts actually protect a thinly-veiled desire to know; they protect curiosity, pure and simple.

Having rather successfully conflated the right to know and the desire to know through tautologous reasoning, judges are, in effect, creating the illusion that the individual's claim to privacy is being balanced against an essential guarantee that is far more important to our society than idle curiosity. This maneuver has encouraged more than the very *legitimate* notion that there is a virtually absolute right to publish. It has also encouraged the *corrupt* notion that there is no need for responsibility. The fact that the media win 95 percent of private facts cases, in effect, gives them (and everyone else -- including direct marketers and the government) the right to assume that, for all intents and purposes, there is no right to privacy. It allows journalists to believe they needn't take any legal -- or ethical -- responsibility for injuring the mental and emotional states of their fellow citizens. The right, and those who claim it in a court of law, may be disregarded entirely, for the courts have sent the message that the right of privacy -- if it exists at all -- is extremely insignificant, if not altogether negligible.

The kind of arrogance that results was revealed aptly in a footnote of Justice White's dissent in *The Florida Star v. B.J.F.* White briefly noted the comments made by the newspaper's attorney during the trial, concerning a threatening phone call received by the plaintiff after the publication of her identification as a rape victim in *The Florida Star*:

> [I]n reference to the [threatening] phone call, it is sort of blunted by the fact that [B.J.F.] didn't receive the phone call. Her mother did. And if there is any pain and suffering in connection with the phone call, it has to lay in her mother's hands. I mean, my God, she called [B.J.F.] up at the hospital to tell her [of the threat] -- you know, I think that is tragic, but I don't think that is something you can blame the Florida Star for.[75]

The courts have effectively slain the right to privacy in private facts cases. McLean's recent observation is worth repeating here. The way in which courts have come to interpret the First Amendment "has fixed matters so that privacy can be defended only at the risk of threatening the media's freedom to report on public discussion."[76]

If the courts are going to "provide a forum to honor a principle," as McLean has noted, "the forum must be fair."[77] In the shadow of tautologous reasoning, that forum is not fair.

While a tautological defense of the news media is consistently linked with the higher virtues and the inalienable protection of the First Amendment, the effectiveness of the amendment is withering. Protecting much of the published material protected in private facts litigation can only serve to *weaken* the First Amendment, allowing it to shield the sensational and injurious, as well as the thoughtful and insightful.

Something also needs to be said about protecting the First Amendment with tautologous reasoning. Cases *have been* decided for the media without using the time-worn rhetoric of "newsworthiness" or "legitimate public concern" and without employing any other sort of tautological rhetoric or argument. A closer look at the nature of the published information protected in cases mentioning neither of the two defenses reveals that the *same kind* of information that has been protected in decisions employing one or the other of the two defenses has also been protected in cases mentioning neither concept. This suggests that the freedom of the press can be protected *without* the use of tautology. A tautologous argument is, by definition, impenetrable. Certainly, we could say that the individual's claim to privacy would be *more* adequately protected in these cases if it weren't against an impenetrable defense.

The outcomes of these cases suggest that when those in the news media act irresponsibly or insensitively, they are able to use their industry status to claim themselves exempt from the consequences of injuring private individuals through the publication of private facts. Injury to individuals through publication is sometimes, *but not always*, merely an unfortunate by-product of the essential freedom of speech and press. It must occasionally be tortious, or theoretically there would be no need for the private facts tort. Those instances in which injury through publication of private facts may be tortious cannot possibly be recognized in the shadow of tautological argument.

Policy makers and judges would do well to abandon the tautological defense and come up with a better one -- one that is not meaningless and impenetrable -- if for no other reason than to illustrate that privacy claims are, in fact, being taken seriously.

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[1] *The Decline of Privacy*, New York Tribune, March 8, 1891, at 17.

[2] Stephen Brainerd, *The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Theory*, 34 American University Law Review 1231, 1233-1237 (1985).

[3] *Id.*; *see also* Allan C. Hutchinson, *Talking the Good Life: From Free Speech to Democratic Dialogue*, The Journal of Law and Liberation, Fall 1989, at 17, generally.

[4] Sidis v. F-R Publishing, 113 F.2d 806, 1 Media L. Rep. 1775, 1777 (2d Cir. 1940).

[5] Of course, in the interest of fairness, it is worth noting that intrusion on the sensibilities of private individuals through the public disclosure of private facts is rare. Many newspapers even have explicit policies against such publication.

[6] Deckle McLean, *Press and Privacy Rights Could Be Compatible*, Communications and the Law, April 1986, at 13, 15.

[7] Cape Publications Inc. v. Hitchner, 549 So.2d 1374, 16 Media L. Rep. 2337, 2339 (Fla. 1989).

[8] E.L. Godkin, *The Rights of the Citizen--To His Own Reputation*, Scribner's Magazine, July-December 1890, at 58-67, 66.

[9] David F. Linowes, *Must Personal Privacy Die in the Computer Age?* 65 American Bar Association Journal 1180, 1181 (1979).

[10] Metter v. Los Angeles Examiner, 35 Cal. App. 2d, 95 P.2d 491, 494 (Cal. Dist. Ct. App. 1939).

[11] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harvard Law Review 289 (1890).

[12] For instance, the two lawyers rested part of their argument on Cooley on Torts, 2d ed. When he wrote his statement on torts in 1888, Cooley referred to a "right to be let alone." As was later pointed out by Trubow, in *Fighting Off the New Technology* (Human Rights, Fall 1982, at 26), Cooley referred to this "right to be let alone" in discussing "assault, battery, false imprisonment and trespass to property."

[13] Warren and Brandeis, *The Right to Privacy*, *supra* note 11, at pp. 289-290.

[14] Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948).

[15] 46 Mich. 160, 9 N.W. 146 (1881).

[16] Warren and Brandeis, *The Right to Privacy*, *supra* note 11, at p. 289.

[17] *Id.* at 313-318.

[18] George Ragland Jr., *The Right of Privacy*, 17 Kentucky Law Journal 85 (1929).

[19] *Id.* at 110-111.

[20] *Notes*, 2 Columbia Law Review 486 (1902).

[21] Robert E. Mensel, *'Kodakers Lying in Wait': Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 American Quarterly 24 (1991).

[22] Godkin, *The Rights of the Citizen*, *supra* note 8, at p. 65.

[23] *Id.*

[24] *The Decline of Privacy*, *supra* note 1.

[25] Roberson v. Rochester Folding Box, 171 N.Y. 538 (1902). This case sparked legislation in New York which made it illegal to publish, without prior authorization, the name and/or likeness of an individual "for the purposes of advertising and trade." This legislation gave rise to a whole slew of cases against the media, under something which resembled what we now call "misappropriation." Judges decided, however, that "news" held a special place in this litigation, and that, although newspapers were sold for profit, the distribution of "news" did not constitute "trade" in the sense that the statute had intended. These cases, therefore, became some of the first cases decided under some sort of "disclosure of private facts" tort of privacy, although it was not recognized as such at the time.

[26] Wilbur Larremore, *The Law of Privacy*, 12 Columbia Law Review 693, 695 (1912). *See also* Ragland, *The Right of Privacy*, *supra* note 18, at p. 86.

[27] Ragland, *The Right of Privacy*, *supra* note 18, at p. 86.

[28] *Id.* at 87.

[29] *Id.* at 91.

[30] William L. Prosser, *Privacy*, 48 California Law Review 383 (1960).

[31] Dorsey D. Ellis Jr., *Damages and the Privacy Tort: sketching a 'legal profile'*, 64 Iowa Law Review 1111 (1979).

[32] Arthur R. Miller, *Our Right of Privacy Needs Protection from the Press*, Human Rights, May 1978), at 16, 16-17.

[33] *Id.* at 48.

[34] 62A Am. Jur. 2d *Privacy* §91 (1979).

[35] A careful examination of the cases in this study shows that if the courts determined that the facts were *not* private, they did so for one or more of the following reasons: the facts were in the public record or in

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the public eye [*see* Bell v. Courier-Journal and Louisville Times Co., 402 S.W.2d 84 (Ky. 1966); Alarcon v. Murphy, 201 Cal. App. 3d 1, 248 Cal. Rptr. 36 (1988); Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 391 N.E.2d 935, 5 Media L. Rep. 1940 (1979)]; the facts were already "widely known" [*see* Sipple v. Chronicle Publishing, 154 Cal. App. 3d 1040, 10 Media L. Rep. 1690 (1984); Reuber v. Food Chemical News Inc., 18 Media L. Rep. 1689 (4th Cir. 1991)]; the person to whom the facts pertain was a public official or public figure [*see* 62A Am. Jur. 2d *Privacy* §193 and §194 (1979) for a complete explanation of what the courts have come to define as a public figure or official]; the person to whom the facts pertain, though private, voluntarily or involuntarily became part of a matter of "legitimate public concern" [*see* Sipple v. Chronicle Publishing, 154 Cal. App. 3d 1040, 10 Media L. Rep. 1690 (1984)]; the person to whom the facts pertain consented to publication [*see* McAdam v. Ridge Press Inc., 394 N.Y.S.2d 202 (N.Y. App. Div. 1977); Neff v. Time Inc., 406 F. Supp. 858 (W. D. Pa. 1976)]; or the person to whom the facts pertain was deceased at the time the suit was brought [dead persons have no right of privacy -- *see* Abernathy v. Thornton, 263 Ala. 496, 83 So. 2d 235 (1955); Carlson v. Dell Publishing Co., 65 Ill. App. 2d 209, 213 N.E.2d 39 (1965)].

[36] 62A Am. Jur. 2d *Privacy* §91 (1979).

[37] Deckle McLean, *Unconscionability in Public Disclosure Privacy Cases*, Communications and the Law, April 1988, at 31, 40.

[38] Included in this category were any articles or photos that simply could not be defended by newsworthiness. For instance, *excluded* from the study were cases involving nude photos published in sexually explicit magazines, but not those involving nude photos contained in the pages of, say, the New York Times.

[39] Such publications often end up falling under the "false light" tort of privacy. Also included in these publications were photos published in connection with libelous articles, thereby becoming associated with the false facts therein.

[40] Citations for the cases examined were obtained primarily from six sources: Am. Jur. 2d (1979), C.J.S. (1978), Restatement (Second) of Torts (1981 and 1989), Media L. Rep., Prosser's *Privacy* [48 California Law Review 383 (1960)] and citations within the cases themselves. Obviously, it cannot be said that the cases examined and/or used in this study constitute an exhaustive list of cases brought under the disclosure of private facts tort as it has been defined above. A complete list of the 745 cases examined is available from the author.

[41] Hillman v. Star Publishing Co., 64 Wash. 691, 117 P. 594 (1911).

[42] Armstrong v. H&C Communications Inc., 18 Media L. Rep. 1845 (Fla. Dist. Ct. App. 1991).

[43] Mitchell Hartman, *Press and Public Collide as Concern Over Privacy Rises*, The Quill, November/December 1990, at 3-7, 4.

[44] *See* James E. Katz and Annette R. Tassone, *Public Opinion Trends: Privacy and Information Technology*, Public Opinion Quarterly, Spring 1990, at 125, especially 126, 134-139.

[45] *See* Hartman, *Press and Public Collide as Concern Over Privacy Rises*, *supra* note 43, generally.

[46] 146 So.2d 623 (Fla. Dist. Ct. App. 1962).

[47] 322 F.2d 502 (4th Cir. 1963).

[48] The publication of a private debt was settled in Trammel v. Citizens News Co. Inc., 285 Ky. 529, 148 S.W.2d 708 (1941) -- this was the only case of its kind examined in this case study. The publication of the name of a rape victim was questioned in State v. Evjue, 253 Wis. 146, 33 N.W.2d 305 (1948). This case has been essentially thrown out, however, since it goes against more recent rulings concerning the publication of the name of a rape victim -- especially Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and The Florida Star v. B.J.F., 499 So.2d 883, *rev'd*, 491 U.S. 524 (1989). Indecent exposure was at issue in both McCabe v. Village Voice Inc., 550 F.Supp. 525, 8 Media L. Rep. 2580 (E. D. Pa.1982) and Daily Times Democrat v. Graham, 276 Ala. 380, 162 So.2d 474 (1964). It should be noted that seven other cases involving indecent exposure were decided in favor of the media. In all but one of those seven cases, however, the plaintiff had become a part -- willingly or not -- of what the courts termed a "news event" (although one involved an investigative piece concerning a current issue). The case in which the plaintiff was not involved in a news event was McAdam v. Ridge Press Inc., 394 N.Y.S.2d 202 (N.Y. App. Div. 1977). The case is similar in nature to the *McCabe* case, decided in 1982 -- both involved the nude picture of a woman, not intended for use in a newspaper. Publication in a newspaper involving indecent exposure which is not connected with a timely "news event," therefore, may be the only type of publication still occasionally protected by the private facts tort. This type of publication, of course, is uncommon.

[49] 420 U.S. 469, *on remand* 234 Ga. 67, 214 S.E.2d 530 (1975).

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[50] 499 So.2d 883, *reversed* 491 U.S. 524 (1989).

[51] See note 7.

[52] Jenkins v. Dell Pub. Co., 251 F.2d 447 (3d Cir. 1958).

[53] *Id.*

[54] *See* Barbieri v. News-Journal Co., 56 Del. 67, 189 A.2d 773 (1963); Boyd v. Thomson Newspaper, 6 Media L. Rep. 1020 (W. Ark. 1980); Cape Publications Inc. v. Bridges, 423 So.2d 426 (Fla. Dist. Ct. App. 1982); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); and Sidis v. F-R Publishing, 113 F.2d 806, 1 Media L. Rep. 1775 (2d Cir. 1940), among others. An example of a case that truly is *not* tautologous is Berg v. Minneapolis Star & Tribune Co. [79 F. Supp. 957 (D. Minn. 1948)], a case involving publication of a photograph, in which it was stated that "if the news item constitutes legitimate news, the picture seems entirely appropriate to the news," thereby implying that some material published as "news" may not, in fact, be "legitimately" newsworthy. The court goes on to justify its determination that the information in question was, in fact, "legitimate news" on the grounds that the photograph was not offensive, and was accompanied by inoffensive information that was a matter of public record.

[55] 64 Wash. 691, 117 P. 594, 596 (1911).

[56] 16 F. Supp. 746, 748 (E.D.N.Y. 1936)

[57] 35 Cal. App. 2d 304, 95 P.2d 491, 494 (1939).

[58] 162 Misc. 776, 295 N.Y.S. 382, 389 (N.Y. Sup. Ct. 1937).

[59] 420 U.S. 469, 496 (1975).

[60] Goelet v. Confidential Inc., 171 N.Y.S.2d 223, 226 (N.Y. App. Div. 1958). As noted, this case also quoted directly from *Sidis*, in which, recall, it was remarked: "Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion of the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day." (113 F.2d 806, 809)

[61] Spradley v. Sutton, 9 Media L. Rep. 1481, 1483 (Fla. Cir. Ct. 1982).

[62] *Id.*

[63] Penwell v. Taft Broadcasting Co., 13 Ohio App. 3d 382, 469 N.E.2d 1025, 1028 (1984).

[64] 549 So.2d 1374, 16 Media L. Rep. 2337, 2340 (Fla. 1989).

[65] *Id.* at 2339.

[66] 491 U.S. 524, 546 (1989).

[67] 447 N.W.2d 105, 16 Media L. Rep. 2408 (Wis. Ct. App. 1989).

[68] *Id.* at 2414.

[69] 584 P.2d 1310, 4 Media L. Rep. 1749 (N.M. Ct. App. 1978).

[70] The Florida Star v. B.J.F., 491 U.S. 524, 553 (19489) (White, J., dissenting).

[71] *As quoted in* Doe v. Sarasota-Bradenton Florida Television Co. Inc., 436 So.2d 328, 332 (Fla. Dist. Ct. App. 1983).

[72] *Id.*

[73] Roshto v. Hebert, 9 Media L. Rep. 2417 (La. 1983)

[74] Gary Hebert, *Remembrance of Things Past: The Inside Story*, Media Law Notes (Association for Education in Journalism and Mass Communication, University of South Carolina, Columbia, S.C.), November 1984, 1. It is only fair to mention here that Hebert was only sued for the second of two publications involving the brother's cattle theft charges. After Hebert published a page from 1952 that reported that the brothers had been *charged* with cattle theft, the plaintiffs reportedly requested that the paper not print such information. Hebert then reprinted the front page telling of the brothers' conviction. Certainly, this must call into question Hebert's claim that the pages were "randomly selected."

[75] 491 U.S. 524, 547 (1989) (White, J. dissenting).

[76] McLean, *Press and Privacy Rights Could Be Compatible*, *supra* note 6, at p. 15.

[77] Deckle McLean, *Privacy Invasion Tort: Straddling the Fence*, Communications and the Law, June 1985, at 15, 30.

APPENDIX A
Quantitative Breakdown of Case Study Results by Decade

	Total	10s	20s	30s	40s	50s	60s	70s	80s	90s
Total cases examined	**114**	**2**	**0**	**3**	**8**	**15**	**18**	**20**	**40**	**8**
Cases decided for media...	**108**	**2**	**0**	**3**	**6**	**15**	**15**	**20**	**39**	**8**
% of total cases examined	**95%**	**100**	-	**100**	**75%**	**100**	**83%**	**100**	**98%**	**100**
...decided solely on newsworthiness	17	-	-	-	-	2	2	6	7	-
% of cases won by media	16%	-	-	-	-	13%	13%	30%	18%	-
...decided solely on legitimate concern	4	-	-	1	-	-	-	1	1	1
% of cases won by media	4%	-	-	33%	-	-	-	5%	3%	13%
...decided solely on either	**21**	-	-	1	-	2	2	7	8	1
% of cases won by media	**19%**	-	-	**33%**	-	**13%**	**13%**	**35%**	**21%**	**13%**
...decided primarily on newsworthiness	36	-	-	-	3	7	7	6	10	3
% of cases won by media	33%	-	-	-	50%	47%	47%	30%	26%	38%
...decided primarily on legitimate concern	8	-	-	1	2	-	-	2	3	0
% of cases won by media	7%	-	-	33%	33%	-	-	10%	8%	-
...decided primarily on either	**44**	-	-	1	5	7	7	8	13	3
% of cases won by media	**41%**	-	-	**33%**	**83%**	**47%**	**47%**	**40%**	**33%**	**38%**
...solely or primarily on either	**65**	-	-	2	5	9	9	15	21	4
% of cases won by media	**60%**	-	-	**67%**	**83%**	**60%**	**60%**	**75%**	**54%**	**50%**
...only mentioning newsworthiness	11	-	-	-	-	4	2	-	5	-
% of cases won by media	10%	-	-	-	-	27%	13%	-	13%	-
...only mentioning legitimate concern	12	1	-	1	1	-	-	-	8	1
% of cases won by media	11%	50%	-	33%	17%	-	-	-	21%	13%
...only mentioning either	**23**	1	-	1	1	4	2	-	13	1
% of cases won by media	**21%**	**50%**	-	**33%**	**17%**	**27%**	**13%**	-	**33%**	**13%**
...mentioning neither	**20**	1	-	-	-	2	4	5	5	3
% of cases won by media	**19%**	**50%**	-	-	-	**13%**	**27%**	**25%**	**13%**	**38%**
...at least mentioning either	**88**	1	-	3	6	13	11	15	34	5
% of cases won by media	**81%**	**50%**	-	**100**	**100**	**87%**	**73%**	**75%**	**87%**	**63%**
Total no. of cases employing tautology	30	-	-	-	1	1	3	5	18	2
% of cases won by media	26%	-	-	-	13%	7%	17%	25%	45%	25%
...decided solely on newsworthiness or legitimate concern, and employing tautology	10	-	-	-	-	1	1	2	6	-
% of cases decided solely on either	48%	-	-	-	-	50%	50%	29%	75%	-
...decided solely or primarily on either defense, and employing tautology	23	-	-	-	1	1	2	5	12	2
% of solely or primarily on either	35%	-	-	-	20%	11%	22%	33%	57%	50%
...only mentioning either defense, and employing tautology	6	-	-	-	-	-	1	-	5	-
% of cases only mentioning either	26%	-	-	-	-	-	50%	-	38%	-
...not mentioning either defense, and employing tautology	1	-	-	-	-	-	-	-	1	-
% of cases not mentioning either defense	5%	-	-	-	-	-	-	-	20%	

continued on next page...

	Total	10s	20s	30s	40s	50s	60s	70s	80s	90s
Cases decided for individual...	6	-	-	-	2	-	3	-	1	-
% of total cases examined	5%	-	-	-	25%	-	17%	-	3%	-
...expressly overcoming the newsworthiness defense	2	-	-	-	-	-	2	-	-	-
% of cases won by individual	33%	-	-	-	-	-	67%	-	-	-
...information not newsworthy	4	-	-	-	2	-	1	-	1	-
% of cases won by individual	67%	-	-	-	100	-	33%	-	100	-

APPENDIX B
Table of Cases Included in Case Study

Abernathy v. Thornton, 263 Ala. 496, 83 So.2d 235 (1955)

Alarcon v. Murphy, 201 Cal. App. 3d 1, 248 Cal. Rptr. 26 (1988)

Andren v. Knight-Ridder Newspapers, 10 Media L. Rep. 2109 (E. Mich. 1984)

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APPENDIX C
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Ideological Exclusion of Foreign Communicators:
The Lingering Shadow of a McCarthy Era Xenophobia

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Ideological Exclusion of Foreign Communicators:
The Lingering Shadow of a McCarthy Era Xenophobia

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Nobel laureate Colombian novelist and journalist Gabriel Garcia Marquez had to wait for thirty-three years to make his first unrestricted visit to the United States in summer 1991. He was on a secret list of undesirable foreigners since 1958 when he first applied for a U.S. visa. He was on the secret list because of a law proscribing members and affiliates of Communist parties, according to a State Department official. Marquez was not a member of a communist party but was a defender of the Cuban Revolution and a close friend of President Fidel Castro of Cuba. "The ban was irritating at first but . . . there is no anger that lasts 33 years," Marquez recalled in August 1991. He found himself a victim in ideological conflicts because "for decades," he told the New York Times in 1991, "we were the prisoners of two enemy dogmas."[1]

This paper provides an update on ideological exclusion policies and practice of the United States in the recent past.

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[1] Roger Cohen, "Garcia Marquez Looks At Life, Love and Death," New York Times, 21 August 1991, C11, C15. Mr. Marquez's earlier visits to the United States were permitted after a special request for a waiver of his excludability. A novelist when he won a Nobel prize, Marquez is returning to his first profession, journalism, with the start of a daily television news show in Colombia that examines current events. Ibid., C15.

It argues that such policies and practice may disrupt an important communication process preferred by U.S. citizens and the aliens they invited to engage in the process. Such disruptions, when incurred by the U.S. government, violates the first amendment of the Constitution of the United States. Persistent implementation of ideological exclusions by the U.S. government in the twentieth century, particularly since the so-called McCarthy Era of the early 1950s, indicates that the fear of aliens and their ideologies still lingers today.

International Blacklist of Ideological "Undesirables"

The Immigration and Naturalization Act of 1952 was the law that had restricted Mr. Marquez's entry into the United States for over three decades. Better known as the McCarran-Walter Act, Section 212 (a)(27)-(29) of the 1952 law provided more than thirty grounds that made noncitizens believing in anarchism, communism, or totalitarianism ineligible for a U.S. visa. Aliens having any affiliation with any groups advocating or supporting these -isms also were excludable.[2]

The act was enacted during a period of "Great Fear" of communist menace in this country.[3] The period was marked by government inquisition into the minds of persons -- aliens and citizens alike -- who were suspected by the U.S. government to be communists or affiliates with communist organizations.[4] Senator Joseph R. McCarthy (R-Wisconsin) was the most notorious figure of this period. McCarthy achieved national prominence by piling up sensational and unsubstantiated accusations against government officials and other innocent people in the United States, calling them foreign agents or part of an international plot to propagate communism and destroy Western democracy, especially the democratic institutions in the United States. Senator McCarthy's extraordinary anti-alien, anti-communist activities have introduced two terms into the dictionary of American history: McCarthyism and the McCarthy Era of the early 1950s. The anti-alien and anti-communist fear in the McCarran-Walter Act well represented the legacy of the McCarthy Era.

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[2] Immigration and Nationality Act of 1952, 66 Stat. 163, 184-187.

[3] A good description of this period of fear is David Caute, The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower (New York: Simon & Schuster, 1978).

Aliens, as defined by U.S. immigration laws, are not U.S. citizens. For the purpose of this paper an alien is a foreign national who is by profession a communicator (journalist, writer, musician, politician) or because of an invitation from U.S. citizens seeks entry into the United States to communicate with the citizens extending the invitation.

Exclusion of aliens under the political and ideological provisions of the McCarran-Walter Act has been recognized by scholars as ideological exclusion.[5] Based on these provisions in the 1952 act, the United States government continually expanded its secret list of international "undesirables" that were officially unwelcome should they seek entry into the United States. The existence of this international blacklist has been known to the public for years;[6] any substantial portion of the list was, however, not disclosed until 1990. The most recent versions of the secret list are dubbed NAILS and AVLOS, both being computerized for easy updating and retrieval. NAILS, short for National Automated Immigration Lookout System, is compiled and maintained by the U.S. Immigration and Naturalization Service (INS). AVLOS, short for Automated Visa Lookout System, is kept by the U.S. State Department. The two versions, updating each other, are comparable in scope and contents.

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[4] The inquisition is well-documented in Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities (New York: Farrar, Straus and Giroux, 1968).

[5] See for example Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York, "Visa Denials on Ideological Grounds: An Update," Seton Hall Legislative Journal 8 (1984-1985) [Hereafter Lawyers Committee, "Visa Denials"], 249-278; Alison E. Clasby, "McCarran-Walter

An edited version of the NAILS list was first disclosed to the Lawyers Committee for Human Rights in New York in June 1990. A complete version of the list should have contained some 2.7 million entries (i.e. aliens excluded or excludable) at some point in 1990. The edited version ran 700 pages. A preliminary analysis by the Lawyers Committee in 1990 showed that 340,000 entries were on the list for ideological reasons.

Act and ideological exclusion: a call for reform," University of Miami Law Review 43 (May 1989), 1141-68.

[6] One scholar, for example, estimated in 1987 that the secret list "includ[ed] approximately 50,000 persons who have been identified as potentially excludable . . . because of their political activities." Steven R. Shapiro, "Ideological Exclusions: Closing the Borders to Political Dissidents," Harvard Law Review 100 (February 1987) [Hereafter Shapiro, "Closing the Borders"], 932.

The number was a giant leap from a meager 800 such entries in 1952. Two-thirds of the 340,000 were, however, added after 1980; 4,399 were added between January and March 1990. The 340,000 ideologically excludable foreigners on the list represented 146 nations (such as Mexico and Poland) and other jurisdictions (such as Palestine and Hong Kong).[7]

The largest contingent of ideological "undesirables" on the list was from China, totalling 106,777. Soviet Union (no longer existent) ranked the second with 33,064. The two countries were followed by Yugoslavia (with 31,734 being ideologically excluded or excludable), Hungary (28,450), and Poland (24,608). These countries were trailed by Czechoslovakia, Rumania, and West Germany (merged with East Germany). Mexico ranked the tenth, with 5,402 of its nationals being tagged as ideological undesirables. Japan ranked the eleventh, with 4,393.[8] An edited version of AVLOS, the State Department's counterpart of the NAILS, was disclosed to the public in summer 1991. The number of ideologically excludable foreigners on AVLOS was, as of fall 1991, comparable to that on the INS NAILS. The Los Angeles Times reported 320,000 such aliens on AVLOS; the Christian Science Monitor, however, reported 367,000.[9]

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[7] Frank J. Prial, "Big Growth Disclosed in List of Barred Aliens," New York Times, 23 June 1990, A24; "INS List bars 340,000 aliens from entering U.S. for political reasons," Wall Street Journal, 25 June 1990, B2.

[8] Ibid. The NAILS list might contain some duplications.

[9] "Bleaching a Civil Liberties Stain," Christian Science Monitor, 21 June 1991 [Hereafter Christian Science Monitor, 21 June 1991], p. 20; Ashley Dunn, "U.S. Blacklist Outlives the Cold War," Los Angeles Times, 6 October 1991 [Hereafter Los Angeles Times, 6 October 1991], A1, A24, A26.

Ideological Exclusion in Action

The Lawyers Committee for Human Rights in New York obtained the NAILS list after a three-year delay. The Committee filed a suit at a federal court in Manhattan, New York in 1987 asking the government for the disclosure of the list. The Committee was compelled to do so because the government had refused to specify grounds on which it expelled a client of the Committee. On October 13, 1986, Patricia Lara, a Colombian writer and journalist, arrived at New York's Kennedy International Airport. The purpose of her trip was to attend an award ceremony at Columbia University in New York (Ms. Lara graduated from the university's School of Journalism in 1980). She was, however, arrested at the airport, detained there overnight, transferred to an INS detention center for two days and jailed in a maximum-security federal prison for five days. Her valid U.S. visa was revoked during the imprisonment. She was deported to Colombia - after a week of strict confinement in the United States. The government offered no explanation of its action against her. In 1987 she filed a wrongful detention suit at a district court in New York. She asked members of the Lawyers Committee for Human Rights in New York to be her legal counsel.[10]

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[10] "INS Detains Latin Writers; Expels One; Confiscates Belgian's Papers at Airport," The News Media & The Law 11 (Winter 1987) [Hereafter Media & Law (Winter 1987)]: 4. Tom Ronse, a Belgian reporter who worked for both Belgian and Dutch newspapers, was detained overnight in late September, 1986 at the Newark International Airport for carrying newspapers, photocopied articles and translations that INS inspectors suspected of espousing "communist doctrine." Ronse was

Arthur Helton of the Lawyers Committee surmised in 1987 that Ms. Lara's expulsion from the United States probably was related to her book about Colombian guerilla movements and several articles she wrote that criticized Reagan administration's Central American policies.[11] The U.S. State Department and the Central Intelligence Agency admitted in 1991 that these were the grounds that led to the revocation of her U.S. visa in 1986.[12]

In early 1991, the government proposed to Lara that she would be granted a U.S. visa if she would drop her suit (she asked for $10 million in the suit). She agreed. Now married to Colombian ambassador to Austria and also appointed by her newspaper, El Tiempo, as its overseas correspondent in Vienna, Austria, Lara found it convenient to stop at New York en route from Colombia to Europe to fulfill her journalistic mission. For an ideological reason, the U.S. government made Ms. Lara wait for five years to get this permission to travel to the United States.[13]

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permitted entry the next day but his papers were detained by the INS for further inspection for a week. Ibid., 5.

[11] Ibid., 4.

[12] "Colombian Writer Drops Suit After U.S. Issues Visa to Her," The News Media & The Law 15 (Spring 1991), 38. The Central Intelligence Agency had translated Ms. Lara's If Your Plant Winds, You Will Harvest Storms into English, something that "had never been done before, even by the publisher." The book profiled leaders of M-19, a guerilla group in Colombia. Ibid.

[13] Dennis Hevesi, "Barred Colombia Settles for Visa in U.S. Suit," New York Times, 1 February 1991, A15. Lara found it "better to be able to go there whenever I want than to have $10 million." Ibid.

The U.S. government adopted a dual system to prevent ideologically excludable visitors from entering the United States. A foreign national must first apply for a U.S. visa at a U.S. consulate outside the U.S. borders for permission to go to the United States. The U.S. consuls abroad make the first scrutiny of the foreign applicants' admissibility. A holder of a U.S. visa must have, at least in theory, passed whatever tests (including an ideological test) at a U.S. consulate. Holding a valid U.S. visa is, however, not a guarantee to admission into the United States. The holder is subject to another scrutiny of admissibility by an INS inspector upon arrival at a U.S. port of entry. A visa holder thus may be barred from the United States (as shown in Ms. Lara's case in 1986).[14]

The process of obtaining a U.S. visa could be a humiliating experience to applicants when they felt that their mind was being searched during the process. "In practice," the New York Times wrote in July 1990, "visitors seeking [U.S.] visas must first declare whether they have, or have ever had, Communist affiliations."[15] Those who declared in the affirmative would be denied visas and their names would be recorded on the State Department's AVLOS list to identify them as excludable in case they again applied for U.S. visas. Even a negative declaration of Communist affiliations did not guarantee admission into the United States. Nor did the government bar only those who were hard-core communists.

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[14] For the visa issuance and review process by the U.S. government, see James A.R. Nafziger, "Review of Visa Denials by Consular Officers," Washington Law Review 66 (January 1991), 1-105.

[15] "Still a Cold War for Aliens," New York Times editorial, 10 July 1990, A18.

In February 1989, "a few months after shaking hands with President Bush at a Washington meeting," James Hunter, a Canadian and president of the International Transport Workers Federation, was stopped at the U.S. immigration desk at a Toronto airport on his way to catch a plane to Florida to join a labor conference. An INS officer told Hunter he would be denied entry into the United States because he had played baseball "when a child with the National Federation of Labor Youth League, the youth wing of the Communist Party."[16] He could be admitted only if he requested special permission from the U.S. attorney general.[17] That request meant that Hunter had to admit to having associated with the "wrong" people. "Hunter refused on principle," the Washington Post reported. He would not be able to attend the labor gathering in Florida. Hunter found it "bizarre" that "the country of the free and the brave wouldn't let someone into their country who played ball on a baseball team 35 years ago with some communists."[18]

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[16] Michael J. Ybarra, "Visas and U.S. Exclusions: The Questions of Ideology, Youth Club Lands Canadian on 'Lookout List'," Washington Post, 9 July 1990 [Hereafter Washington Post, 9 July 1990], A1, A17. Hunter was admitted in his earlier trips to the United States because INS only occasionally verifies a Canadian's admissibility.

[17] By virtue of the McGovern Amendment of 1977, aliens like Mr. James Hunter would be granted a waiver of denial upon proving that their membership in or affiliation with a proscribed organization was involuntary or insubstantial. Foreign Relations Authorization Act for the Fiscal Year 1978, 91 Stat. 848 (1977).

On May 2, 1991, a group of U.S. journalists from the Washington Post, the Time magazine, the U.S. News & World Report and CNN were disappointed when they learned that Abolhassan Bani-Sadr failed to arrive at Washington, D.C. as had been scheduled. Mr. Bani-Sadr, former Iranian president and a member of Ayatollah Ruhollah Khomeini's revolutionary government when it held fifty-two American hostages about a dozen years ago, was scheduled to hold a series of interviews on that day with these journalists in Washington, D.C. These interviews had to be cancelled because the State Department decided on May 1, 1991 to deny Mr. Bani-Sadr's application for a U.S. visa.[19]

Having somehow associated with a government the United States disliked and written a book that criticized the United States government were the grounds on which Mr. Bani-Sadr was denied a U.S. visa on May 1, 1991. In addition to holding interviews with news media in the United States, Mr. Bani-Sadr also intended to promote the American edition of his book, My Turn to Speak: Iran, the Revolution & Secret Deals With the U.S. According to the Washington Post, the book "offers another version of the 'October Surprise' conspiracy theory, charging that members of Ronald Reagan's 1980 campaign team, including then-vice presidential candidate George Bush, negotiated with representatives of the Khomeini regime, offering them money and shipments of weapons in order to delay the release of the American hostages until after the election." It was "full of lurid charges about current and former American officials." Consequentially, the book "became a cause celebre yesterday [May 1, 1991] when the State Department declined to give Bani-Sadr a visa in time for his scheduled visit," the Post reported.[20]

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[18] Washington Post, 9 July 1990, A17.

[19] Loyd Grove, "Iran's Ex-President Bani-Sadr Denied Visa," Washington Post, 2 May 1991, D1, D11. Bani-Sadr was ousted by Khomeini in June 1981 from his presidency. He fled to Europe thereafter and now lives as an exile in Versailles, France.

In November 1991, the State Department denied a visa to Mr. Jose Maria (Joma) Sison, a founder and former leader of the Communist Party of the Philippines and its military arm the New People's Army. Mr. Sison, living in exile in the Netherlands, applied for a U.S. visa so that he could, as a plaintiff, appear in February 1992 before a U.S. District Court in Honolulu, Hawaii to testify against the late Philippines President Ferdinand E. Marcos for human rights abuses.[21] In rejecting Mr. Sison's application for a U.S. visa in November 1991, the U.S. consulate in the Netherlands based "on grounds that he [Mr. Sison] was affiliated with a terrorist organization." It was a rejection that an American Civil Liberties Union (ACLU) attorney found "ridiculous." Kate Martin, another ACLU attorney in Washington, D.C., said that the State Department had, by denying a visa to Mr. Sison, abused U.S. immigration laws that were "intended to keep out the bomb throwers, not those who are politically active groups that the State Department thinks are terrorists."[22]

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[20] Ibid., D11. Amid rising protest from the public against the exclusion of Bani-Sadr, the State Department reconsidered its visa denial decision. Bani-Sadr arrived at Washington, D.C. on May 5, 1991. Lloyd Grove, "Bani-Sadr Thickens the Plot: Iran's Former President, Hoping to Capitalize on His Book's Recycled Allegations," Washington Post, 6 May 1991, B4.

[21] William Rempel, "Filipino's Case Challenges Visa Rule," Los Angeles Times, 16 November 1991 [Hereafter Los Angeles Times, 16 November 1991], A14. Mr. Sison also had asked permission to visit his ailing 89-year-old mother in Los Angeles.

Ideological Exclusion: A Constitutional Anomaly

The First Amendment to the Bill of Rights of the Constitution of the United States bans Congress from making any laws abridging the freedom of speech and association. The amendment does not limit the scope of this ban to laws affecting citizens only. Although excluding foreigners from national borders is an acceptable practice under international laws,[23] ideological exclusion may in theory and practice violate the first amendment.

Theoretically, the first amendment was built upon a general assumption that opinion, contents of speech, and association were not subject to government regulation. In Thomas Jefferson's words, "the opinions of men are not the object of civil government, not under its jurisdiction."[24] Ideological exclusion, which is a government action against certain beliefs and associations, can be a constitutional issue. As legal scholar Steven J. Burr noted in 1985, "immigration decisions that most commonly raise first amendment concerns are those which base exclusion or deportation on the content of an alien's beliefs, expressions, or associations."[25]

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[22] Ibid., A14.

[23] "Most nations accord no legal remedy for refusal of entry because it is not considered an appropriate subject for court inquiry." Deborah L. Zimic, "National security visa denials: delimiting the exercise of executive exclusion authority under the Immigration and Nationality Act," Virginia Journal of International Law 28 (Spring 1988) [Hereafter Zimic, "National security visa denials"], 715 n. 18.

In practice, ideological exclusion may deprive Americans of the opportunity to engage in direct dialogue in the United States with certain foreigners. Alternative channels of communication, or less direct ways of dialogue, may exist. The 159-member General Assembly of the United Nations, for example, moved its meeting from its headquarters in New York to Vienna, Austria to hear what Yasir Arafat, PLO chairman, had to say when Secretary of State George Shultz banned Mr. Arafat from entering the United States in 1988.[26] In another instance,

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[24] Thomas Jefferson, "A Bill for Establishing Religious Freedom" (1779), quoted in William O. Douglas, The Anatomy of Liberty: The Rights of Man Without Force (New York: Pocket Books, Inc., 1963), 7.

[25] Steven J. Burr, "Immigration and the First Amendment," California Law Review 73 (December 1985), 1890. Also see comments and analysis in Thomas Omestad, "It's time to end McCarthy-era curb on imported beliefs," Christian Science Monitor editorial, 23 June 1988 [Hereafter Christian Science Monitor, 23 June 1988], p. 14; Lee May, "Visa Policy Banning Ideologues, Leaders Criticized; Defenders Point to Terrorism," Los Angeles Times, 2 May 1989 [Hereafter Los Angeles Times, 2 May 1989], I15; Washington Post, 9 July 1990, A1, A17; Shapiro, "Closing the Borders", 932-945; Alexander Wohl, "Free Speech and the Right of Entry into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act," American University Journal of International Law and Policy 4 (Spring 1989), 443-488.

[26] Paul Lewis, "Arafat Seeks to Attend U.N. Council Debate," New York Times, 22 May 1990, A12. Secretary Shultz's visa

Daniel Ortega, former president of Nicaragua, "got to speak in the United States without a visa" soon after he was denied a U.S. visa in spring 1989. Mr. Ortega's friends in Managua, Nicaragua and the United States managed to get his message across via a satellite-assisted television broadcast. At least thirty-five sites in the United States -- from Massachusetts to California -- successfully received the broadcast.[27]

In many cases a direct contact at interpersonal level between an invited foreign speaker and the Americans who invited the foreigner can be accomplished only when the foreign speaker is admitted into the United States. On April 14, 1989 President Fidel Castro of Cuba and Daniel Ortega, ex-president of Nicaragua, were not able to address the American Society of Newspaper Editors because of the State Department's refusal to issue U.S. visas to them.[28] Although Ortega got to speak to a

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denial decision was based on his perception of P.L.O. being a terrorist organization. Arafat openly renounced terrorism in December, 1988. In May 1990, Arafat again applied to the State Department for a visa to attend a U.N. Security Council debate on the violence committed by Israeli soldiers against Palestinians. Arafat's application met with resistance from U.S. Senate and the State Department did its best to postpone its decision on the issuance or denial of the requested visa. Arafat finally dropped the request. Ibid.

[27] "Television: Revolution in a Box," Ted Koppel Report (Fall 1989). Otega's friends and willing listeners in Nicaragua and the United States broadcast Ortega's speech [and his image] to the United States by renting a studio and ground station for $3,500 and a satellite disk for forty-five minutes for $37 in Managua. Thirty-five sites in the United States -- including a bar in Boston, a union hall in San Francisco and a church at Concord, New Hampshire -- were prepared and able to watch on television and hear what Ortega had to say. "You can keep people out," Ted Koppel conceded, "but not their ideas, or their message, or their image."

[28] "Free Speech for Fidel . . .," Washington Post, 15 April 1989 [Hereafter Washington Post, 15 April 1989], A20. On the

small audience in the United States via satellite (as noted above), it was not quite practical for the American Society of Newspaper Editors to transport its willing members to Cuba and then to Nicaragua for the purpose of discussing with Mr. Castro and Mr. Ortega in person.

On May 17, 1990, Professor Michael Emery, chairman of the journalism department of the University of California at Northridge was compelled to cancel a speech scheduled to be delivered to the university's faculty and students by Mr. Alejandro Bendana, general secretary of the Foreign Ministry of Nicaragua. Mr. Bendana also was supposed to speak at the Occidental College, California in the evening of the same day. Mr. Bendana could meet neither of the speech obligations that day because the U.S. State Department failed to grant a visa to him on time. The department felt it necessary to take special precaution in checking the political background of Nicaraguan officials who applied for U.S. visas but who also had affiliation with the Sandinista National Liberation Front. Although Mr. Bendana was serving under the U.S.-backed coalition government in Nicaragua under President Violeta Barrios de Chamorro, the State Department said it needed time to make sure that "the Sandinistas have really had a change of

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day (April 14, 1989) when both Castro and Ortega were supposed to address the American Society of Newspaper Editors, Secretary of State James A. Baker III explained that "it is American policy . . . to isolate Cuba and Nicaragua." Ibid. "Ortega and Castro were barred because of their prominent positions on a special list of persons, who by virtue of their leadership roles in certain unfriendly governments or their personal ideologies, are considered threats to the U.S. public interest." Los Angeles Times, 2 May 1989, I15.

heart."[29] Meanwhile, for the professors and students in California, it was more practical to wait for the State Department to politically clear Mr. Bendana than remove themselves to Nicaragua to hear what Mr. Bendana had to say.

In the 1980s the State Department had successfully stopped numerous foreign celebrities from speaking to, or otherwise interacting with, Americans in the United States. From 1985 to 1987, the State Department insisted that Ms. Hortensia Allende, the elderly widow of the former Chilean president, was not entitled to a U.S. visa because her presence in the United States would be "prejudicial to the conduct of foreign affairs of the United States." Ms. Allende had on several international forums criticized the United States and advocated for disarmament. The visa denial prevented her from speaking to the Americans who had invited her to do so in the United States.[30] In 1984, Thomas Borge, interior minister of Nicaragua, was denied a U.S. visa. Borge was invited by several U.S. congressmen (including Senator Paul Tsongas of Massachusetts, presidential candiate in 1992), the Chicago Bar Association, the University of Chicago, and several journalists.[31] In 1983,

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[29] Don Shannon, "Visa for Ex-Sandinista Official Delayed," Los Angeles Times, 17 May 1990, B4. Only members of non-Sandinista parities in the governing coalition of Nicaragua were exempt from such review. The process seemed extremely discriminatory in light of the fact that Nicaragua did not require visas for U.S. citizens at the time when Mr. Bendana's visa request was under an extraordinary review.

[30] See Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985). See also Elizabeth Hull, Taking Sides: National Barriers to the Free Flow of Ideas (New York: Praeger Publishers, 1990), 23-24.

[31] See Abourezk v. Reagan 592 F. Supp. 882 (D.D.C. 1984). Borge was denied a visa under subsection (27) of the

Nino Pasti, Italy's four-star general and an ex-NATO official who worked in the Pentagon with the U.S. Secretary of Defense in the 1960s, was denied a U.S. visa for having opposed President Reagan's deployment of U.S. missiles in Europe. Mr. Pasti was invited by New England Campaign to Stop the Euromissiles and the Boston Mobilization for Survival to address a rally in Boston planned by the two inviting organizations for August 23, 1983.[32]

Foreign politicians were not the only targets of ideological exclusion at various times since the Cold War of early 1960s. Dr. Joyce deWangen-Blau, a professor of Kurdish history and literature at the University of Paris, was denied a U.S. visa on suspicion of links with terrorists. Dr. Trevor Munroe, a senior lecturer at the University of West Indies, was barred from the United States because of his membership in a Marxist-Leninist Party in Jamaica. Cosme Cruz-Miranda and Arnaldo Silva-Leon, two Cuban professors of philosophy, were not able to address an American Philosophical Association conference on "Marxism in Cuba" because the United States would not let members of Cuban Communist Party in unless the purported trip

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Immigration and Nationality Act of 1952, which excluded "[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. 1182 (a)(27) (1982).

[32] See Abourezk v. Reagan 592 F. Supp. 882 (D.D.C. 1984). See also Christian Science Monitor, 23 June 1988, p. 14.

was a strictly diplomatic mission.[33] Also excluded from the United States or encountering visa difficulties for ideological or political reasons at the U.S. State Department at various times were "Kobo Abe, Japanese novelist. Dennis Brutus, South African poet. Julio Cartazar, Argentinian novelist. . . . Graham Greene, British novelist. Primo Levi, Italian novelist and essayist. . . . Alberto Moravia, Italian novelist. Farley Mowat, Canadian wildlife writer. Jan Myrdal, Swedish essayist. Ignazio Silone, Italian novelist. Stephen Spender, British poet."[34]

In many cases the U.S. government simply refused to give any explanation of its exclusionary actions. Conceivably, the U.S. government only can find two reasons to exclude foreign speakers on ideological grounds. The first reason may be preventive, i.e., preventing a foreign communicator from disseminating his or her views the U.S. government finds offensive or dangerous. The second can be punitive, i.e., punishing the alien speaker for having a view or affiliation the U.S. government does not accept. If the first amendment is what it states, that is, "Congress shall make no law respecting an establishment of religion . . . ; or abridging the freedom of speech . . . or the right of the people peaceably to assemble," neither reasons the U.S. government might have for ideological exclusion can be justified.

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[33] John A. Scalan, "Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act," Texas Law Review 66 (June 1988), 1497 and footnote 75.

[34] Herbert Mitgang, Dangerous Dossiers: Exposing the Secret War Against America's Greatest Authors (New York: Donald I. Fine, Inc., 1988), 183.

When a government resorts to exclusionary measures to punish someone for his or her ideology it necessarily implies that the government endorses (or establishes) another ideology (or orthodoxy). As the Christian Science Monitor pointed out in June 1991: "The misguided keep-out [AVLOS] list . . . barred few spies or saboteurs, and lots of politicians, labor leaders, writers, and entertainers whose ideology didn't mesh with the patriotic orthodoxy."[35] When the U.S. government prevents an alien from speaking to a peaceable assembly in the United States it effectively aborts or terminates -- at least for the time being -- that assembly. Such prevention also takes away the opportunity of a face-to-face dialogue between the alien speaker and the Americans who desire such a dialogue in their home ground. Freedom of speech, therefore, suffers.

To those who favor an unrestricted flow of information to facilitate what the U.S. Supreme Court in 1964 called an "uninhibited, robust, and wide-open" debate on public issues,[36] government restriction on the entry of alien speakers invited by U.S. citizens is an unjustified barrier to a communication process preferred by both Americans and the alien speaker. The restriction hurts "the first amendment rights of a [U.S.] citizen who desires to engage in the free flow of ideas with the alien invitee," as legal scholar Richard J. Bartolomei noted in 1985. Such restriction "is a prior restraint to the free flow of ideas between United States citizens and invited aliens because the aliens are prevented from any meaningful interaction with the citizens."[37] A free flow of information is essential in a democratic society because, as commonly understood, "no decision, no purposeful control, no comprehension of what is happening in the world, are possible without information."[38]

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[35] Christian Science Monitor, 21 June 1991, p. 20.

[36] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

It is not this paper's intention to elaborate on the necessity of interpersonal communication between peoples of different cultures and political systems. It is sufficient to quote what Russian physicist and political dissident Andrei D. Sakharov found in 1968 to be a necessary foundation on which an anticipated international cooperation in all fields between ideologically different nations could be achieved during the 1980-2000 period. Mr. Sakharov wrote: "Only broad, open discussion, without the pressure of fear and prejudice, will help the majority to adopt the correct and best course of action."[39] An open, successful discussion requires the meeting and interaction of the discussants -- whether they function as speakers, listeners, or both. The closer they are brought together, the better their messages can be conveyed, modified, challenged, and understood.[40]

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[37] Richard J. Bartolomei, "The Ideological Exclusion of Invited Aliens: Should the United States Require a Higher Level of Tolerance by Its Citizens Than It Must Demonstrate Itself?" Georgetown Immigration Law Journal 1 (Fall 1985), 4.

[38] Samuel Eilon, "Some Notes on Information Processing," in Richard C. Huseman, Cal M. Logue and Dwight L. Freshley, eds., Readings in Interpersonal and Organizational Communication (Boston: Holbrook Press, Inc., 1969), 32-33. Professor taught at College of Science and Technology at London, England.

[39] Andrei D. Sakharov, "A Four-Stage Plan for Cooperation," in Andrei D. Sakharov, Progress, Coexistence, and Intellectual Freedom, translated by the New York Times (New York: W.W. Norton & Company, Inc., 1968), 85.

When a foreign communicator is prohibited from engaging in an open discussion with Americans in the latter's home land, such exclusion "necessarily disrupts the process of communication between speaker and listener," law professor Steven R. Shapiro noted. "Every visa denial, even one based on the plainly unobjectionable ground that an alien is afflicted with a dangerous contagious disease, necessarily forecloses some future communication," Professor Shapiro wrote. Although "every sovereign nation has the right to control its borders," he continued, "in a nation premised on the notion that sovereignty flows from the popular will and that the popular will is determined by political debate, ideological exclusion cannot be justified."[41]

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[40] "When the participants in a communication interchange meet face to face," communication scholars say, "they usually employ two channels: the aural and the visual. That is, the message is communicated in part by what is said (the aural channel) and in part by what is shown by gestures, facial expression, posture, etc. (the visual channel) When the speaker cannot be seen (as in sending messages by radio or telephone), the vocal mechanism alone must do the work it normally shares with the rest of the body." Douglas Ehninger, Alan H. Monroe and Bruce E. Gronbeck, Principles of Speech Communication (Glenview, Ill.: Scott, Foresman and Company, 1978), 11.

[41] Shapiro, "Closing the Borders," 933, 944-945. Professor Shapiro has participated in several lawsuits that challenge the government's authority to exclude foreign speakers from the United States on ideological grounds.

Ideological exclusion reflects a government's lack of trust in the people. In 1948, Professor Alexander Meiklejohn found a U.S. attorney general's order barring foreign speakers a detriment to American people's right to know and discuss issues of public interest:

> That order restricts the freedom of speech of temporary foreign visitors to our shores. It declares that certain classes of visitors are forbidden . . . to engage in public discussion of public policy while they are among us. Why may we not hear what these men from other countries, other systems of government, have to say? For what purpose does the Attorney General impose limits upon their speaking, upon our hearing?

Professor Meiklejohn challenged the necessity of insulating America from foreign ideologies: "Do We, the People of the United States, wish to be thus mentally 'protected'?"[42]

In April 1989, Secretary of State James A. Baker III told the American Society of Newspaper Editors that it was an American policy to isolate Cuba and Nicaragua. For that reason Fidel Castro and Daniel Ortega were denied U.S. visas so that they could not use a "prominent forum" such as a conference of the American Society of Newspaper Editors to expound their views. Not convinced by this excuse, the Washington Post found the U.S. government "unnecessarily jumpy about contending with a couple of troublesome but also troubled Latin leaders." The Post felt belittled by the government: "The editors could have handled them, we think, and the public would have had a look for themselves." Arguing that "speech poses no [terrorist] threat" that the U.S. government perceived, the Post wrote:

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[42] Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (New York: Harper & Row, 1948), xiii-xiv.

> Were they [Castro and Ortega] to appear in Washington, they would no doubt use the occasion to make their best case. But they would be exposed to questioning about the whole range of their policies. It is our firm belief that the American people could have survived the encounter and rendered their own judgement about Fidel Castro and Daniel Ortega.[43]

That ideological exclusion violates the integrity of the Constitution of the United States is best described in 1985 by nineteen lawyers in New York City in a report on several ideological exclusion cases:

> But though we profess devotion to democracy and free speech, we practice that devotion more conscientiously at home, where we know the Constitution requires ideological tolerance. We face the world, it seems, with fear of the ideas that may invade from abroad, and so we deny entry to foreigners with unpopular beliefs.[44]

As a result of this fear, the lawyers noted, "our citizens are denied exposure to ideologies relevant to our world. . . . In short, what we see, hear and experience is regulated by our government." The lawyers challenged the regulation: "Whatever the government may do in this area, it ought not to do this: exclude from this country people whose political views are not to its liking."[45]

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[43] Washington Post, 15 April 1989, A20.

[44] Lawyers Committee, "Visa Denials," 254-56. It reported U.S. government's exclusions of -- among others -- two Nobel Prize winners Carlos Fuentes, a Mexican novelist, and Gabriel Garcia Marquez, a Colombian author; Dennis Brutus, a South African poet; Dario Fo, an Italian playwright; Angel Rama, a Uruguayan literary essayist; Jean Pierre Vigier, a French physicist.

[45] Ibid., 254, 263, 266-67.

Legacy of an Anti-alien Anti-Communist Ideology

The United States has long maintained an ambivalent attitude toward international visitors. The origins of U.S. government's exclusion of ideological "undesirables" rest deep in the nation's history. While boasting that it is a land welcoming the "Stranger" and people "of all Nations And Religions,"[46] and a nation embracing the "huddled masses yearning to breathe free,"[47] the government has for most of this century found reasons to keep out the "undesirable" visitors. To the people of a nation of immigrants, it is indeed difficult to concede to what legal scholar James W. Mohr observed in 1970: "the history of American immigration law is a story of fear and exclusion."[48] However, "[certain] Americans feel a special skittishness and ambivalence about the subject [of immigration]," Professor Peter H. Schuck of Yale Law School noted in 1991. "Our self-contradictions abound. Defining ourselves as a nation of immigrants, we also view immigration as a threat."[49]

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[46] "George Washington to the Members of the Volunteer Association and Other Inhabitants of the Kingdom of Ireland Who Have Lately Arrived in the city of New York (December 2, 1783)," reprinted in Moses Rischin, ed., Immigration and the American Tradition (Indianapolis: The Bobbs-Merrill Co., Inc., 1976), 43. U.S. Congress first enacted laws to bar foreigners in Alien and Sedition Acts of 1798. The acts consisted of the Naturalization Act (raising naturalization criteria), the Alien Act (authorizing president to halt immigration and deport aliens), the Alien Enemies Act (permitting expulsion of persons not yet naturalized), and the Sedition Act (punishing critics of the government), 1 Stat. 566-97.

[47] Emma Lazarus' poem on the Statue of Liberty pedestal in New York City; quoted in John F. Kennedy, A Nation of Immigrants (New York: Popular Library, 1964), 113-114.

[48] James W. Mohr, "Opening the Floodgates to Dissident Aliens," Harvard Civil Rights - Civil Liberties Law Review 6 (December 1970), 141.

This fear of foreigners was reflected, for example, in four major immigration acts of this century. The Immigration Act of 1903 barred anarchists because Congress believed that Leon Czolgosz, who assassinated President McKinley in 1901, was an anarchist.[50] During what historians called the "Red Scare" period, Congress passed the Alien Act of 1918 that again barred anarchists. It also added "similar classes" -- referring to Russian Bolsheviks -- to the list of the excludable.[51] The Immigration Act of 1952 (McCarran-Walter Act) was enacted during what historians called the McCarthy era of "Great Fear."[52] As noted earlier, the 1952 act barred anarchists, communists, and totalitarians.

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[49] Peter H. Schuck, "The Emerging Political Consensus on Immigration Law," Georgetown Immigration Law Journal 5 (Winter 1991), 1.

[50] Section 2 of the Act of March 3, 1903 (Anarchist Exclusion Act) barred "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law." 32 Stat. 1214. Czolgosz's parents came from Poland; Czolgosz was U.S. citizen by birth. Anarchist societies in Cleveland, Ohio rejected Czolgosz's request for admission. Jack Pearl, The Dangerous Assassins (Derby: Conn.: Monarch Books, Inc., 1964).

[51] Act of October 16, 1918, or An Act To exclude and expel from the United States aliens who are members of the anarchistic and similar classes, 40 Stat. 1012-13. See also Robert K. Murray, Red Scare: A Study of National Hysteria, 1919-1920 (New York: McGraw-Hill, 1964).

[52] See David Caute, The Great Fear: The Anti-Communist Purge under Truman and Eisenhower (New York: Simon and Schuster, 1978).

The ambivalence also was apparent when President George Bush signed the Immigration Act of 1990. In this new measure, which took effect on June 1, 1991, Congress responded to the easing of East-West tensions by permitting entry of foreign visitors whose "beliefs, statements, or associations . . . would be lawful within the United States."[53] (This language is meaningless unless Congress believes that "some beliefs, statements, or associations . . . would [**not**] be lawful within the United States.") This recognition of the First Amendment interest of foreign visitors was, however, marred by another section of the 1990 act: "Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is excludable."[54]

This last section sustained a practice of preventing a direct interaction in the United States between U.S. citizens and foreigners with certain political convictions that differed from those Congress and the president accepted. The section also ran contrary to the principle enunciated in the Helsinki Accords of 1975. The Accords required all of the thirty-five signatories, including the United States, to pledge to facilitating and fostering greater international freedom of movement and exchange of ideas.[55] The last section of the 1990 act also was contradictory to Congress's intention in its resolution of August 2, 1989 to uphold the Helsinki Accords.[56]

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[53] Immigration Act of 1990, 104 Stat. 5071. The act also provided that aliens with such beliefs or associations might still be excluded if "the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest." Ibid., 5071. In another section, the act provided against entry of any alien who "has engaged in a terrorist activity" or "a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity." Ibid., 5069. These provisions also existed in the McCarran-Walter Act of 1952 (as amended). For an analysis of exclusion on national security and foreign policy grounds (such as the visa applicant being a terrorist), see Zimic, "National security visa denials", 711-751.

[54] Immigration Act of 1990, 104 Stat. 5071.

The link between the above-mentioned immigration acts from 1903 to 1990 is clear. These acts reflect a fear of foreign ideas. As law professor David Cole noted, the 1990 act "looks unfortunately like more of the same [as the McCarran-Walter

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[55] Conference on Security and Co-Opearation in Europe: Final Act [commonly known as the Helsinki Accords], in Human Rights: International Documents (James Avery Joyce, ed. The Netherlands: Sijthoff & Noordhoff International Publishers BV, Alphen aan den Rijn, 1978), 1374-1431. The conference was "aware of the contribution made by international tourism to the development of mutual understanding among peoples." The participating States also "intend to facilitate wider travel by their citizens for personal or professional reasons and to this end they intend in particular." They promised to "simplify and to administer flexibly the procedures for exit and entry," and to "make it their aim to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and to improve the conditions under which journalists from one participating State exercise their profession in another participating State, and . . . to facilitate the dissemination of oral information through the encouragement of lecture tours by personalities and specialists from the other participating States, as well as exchanges of opinions at round table meetings, seminars, symposia, summer schools, conferences and other bilateral and multilateral meetings." Ibid., 1405, 1411, 1413, 1415.

[56] U.S. Senate and House of Representatives Joint Resolution to designate August 1, 1989 as "Helsinki Human Rights Day," Act of August 2, 1989 in 103 Stat. 176. The resolution authorized and requested the President of the United States "to issue a proclamation reasserting the American commitment to full implementation of the human rights and humanitarian provisions of the Helsinki accords." Ibid.

Act]. The new law continues to draw ideological lines and may well increase the administration's ability to exclude and deport aliens for political reasons."[57] The Immigration Act of 1990 permits the exclusion of such aliens whose admission into the United States "the Secretary of State personally determines . . . would compromise a compelling United States foreign policy interest."[58] The 1990 act also added a new category -- terrorist activities -- into the grounds for exclusion. One such activity is defined as the "solicitation of any individual for membership in a terrorist organization."[59] In an unprecedented manner, the 1990 act specified the Palestine Liberation Organization as a group that "engaged in a terrorist activity."[60] Never in the history of this nation's immigration legislation had a foreign political organization been singled out and outlawed in an official act.[61] As the Los Angeles Times noted in October 1991, the focus of the U.S. practices of ideological exclusion "has only been shifted away from the disappearing communist threat to new ideological demons of the modern age."[62]

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[57] David Cole, "McCarran-Walter Act Reborn?" Washington Post, 18 November 1990, C7. Cole is staff attorney with the Center for Constitutional Rights in New York.

[58] Immigration Act of 1990, 104 Stat. 5071. The Lawyers Committee for Human Rights in New York found 8,722 people listed on AVLOS for national security and foreign policy reasons. "These people will continue to be listed because they may still be excluded under the immigration law." Martin Tolchin, "Panel Clears Bill to Make U.S. Purge List of Aliens," New York Times, 25 September 1991 [Hereafter New York Times, 25 September 1991], A19.

[59] Immigration Act of 1990, 104 Stat. 5069-5070.

[60] Ibid., 5069.

[61] A probable exception is the Nazi party of Germany.

Congress has not yet found a cause to modify the Immigration Act of 1990. It did find a cause to clean the State Department's AVLOS list. On September 24, 1991 Congress adopted a measure that gave the State Department three years to "remove from a secret [AVLOS] list more than 300,000 aliens it has considered ideologically unacceptable to enter the United States."[63] It is worth noting that the measure, based on its Senate version, meant that the AVLOS list may stay active till September 1994. The House version of the measure, not adopted by Congress, gave the State Department only six months to purge the names of ideologically excludable aliens from the list. It should also be noted that Congress ordered the purge to be conducted in line with the existing laws, i.e., the Immigration

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[62] Los Angeles Times, 6 October 1991, A1, A24. AVLOS is short for Automated Visa Lookout System. The "ideological demons" here referred to such people like members of the Palestine Liberation Organization, whose leading members are on NAILS and AVLOS. "Among political leaders on the list were Ian D. Smith, the former Prime Minister of Rhodesia; Daniel Ortega Saavedra, former president of Nicaragua, and Yasir Arafat, head of the Palestine Liberation Organization" New York Times, 25 September 1991, A19.

[63] New York Times, 25 September 1991, A19. The final version of the "appropriation act for fiscal years 1992 and 1993 for the Department of State and other purpose" stipulates that "the Secretary of State may not include in the Automated Visa Lookout System, or in any other system or list which maintains information about the excludability of aliens under the Immigration and Nationality Act, the name of any alien who is not excludable from the United States under the Immigration and Nationality Act," and accordingly, "not later 3 years after the date of enactment of this Act, the Secretary of State shall . . . correct the Automated Visa Lookout System." Section 128 of the Act of October 28, 1991, in 105 Stat. 647, 660.

Act of 1990 in its entirety. The NAILS list, the INS version of AVLOS, is left intact.[64] How the NAILS list is to coexist with a gradually shrinking AVLOS list is one puzzle Congress is yet to solve.

Some of the ideological "undesirables" on AVLOS may, however, be reconstructed by the State Department as a new category of the excludable. As the New York Times reported, "the Senate version [of the September 24, 1991 measure] also gave the State Department leeway in putting names on another, acceptable list of people who were considered a threat to national security or inimical to the nation's foreign policy interest."[65] Mr. Sison, former leader of the Communist Party of the Philippines, was, as noted earlier, barred from the United States in November 1991, six months after the Immigration Act of 1990 took effect and two months after Congress ordered the State Department to purge the names of ideological "excludables" from AVLOS. Mr. Sison was barred because of his past membership in a communist party that was recognized by the State Department as a "terrorist" group. Despite the fact that the 1990 act reduced total grounds of exclusion to nine from over thirty in the McCarran-Walter Act of 1952, it still is too soon to celebrate the end of a xenophobic paranoia that had periodically dominated this nation. The paranoia still persists in the nation's immigration laws. As a Washington Post editorial noted in November 1990,

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[64] "In one omission, Congress failed to order the U.S. Immigration and Naturalization Service to purge its list of excludable foreigners, which closely resembles the State Department list." Los Angeles Times, 6 October 1991, A24.

[65] New York Times, 25 September 1991, A19.

> Reports of the McCarran-Walter Act's death are greatly exaggerated. Its spirit lives on in the 1990 revision, which continues to deny immigrants the very freedoms of belief and associations upon which this nation of immigrants was founded. Far from repudiating the ideological litmus test, Congress merely adjusted it to today's paranoias. The national pastime of witch hunting did not begin with the McCarran-Walter Act, and unfortunately it will not end with its repeal.[66]

The democratic tradition of this nation of immigrants is too dear to be stained by a close-door xenophobia. In 1962, William O. Douglas, Associate Justice of the United States Supreme Court, began his "Lecture 1: Freedom of Expression" of The Right of the People by citing Hugh Gaitskell's admonition to Nikita Khrushchev to enlighten the Russian leader on what democracy was supposed to be. During his visit to Britain, Khrushchev challenged Gaitskell, a British Labor leader, to tell him the difference between "your [British] democracy and ours [Soviet's]." Gaitskell replied in a flash, "Read Pericles's funeral oration."[67] Had Khrushchev taken the advice and thumbed through the pages of Pericles' oration, he would have found this:

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[66] Barbara Vobejda, "Foreign Policy and Visas: Questions of Exclusion," Washington Post, 26 November 1990, A9.

[67] William O. Douglas, The Right of the People (New York: Arena Books, 1962), 9.

> We are called a democracy, for the administration is in the hands of the many and not of the few. . . . There is no exclusiveness in our public life, and in our private intercourse we are not suspicious of one another, nor angry with our neighbor if he does what he likes; we do not put on sour looks at him which, though harmless, are not pleasant.[68]

Pericles, who delivered the oration over dead Athenian warriors in 430 B.C., continued: "Our city is thrown open to the world, and we never expel a foreigner or prevent him from seeing or learning anything." And, "the great impediment to action is . . . not discussion, but the want of that knowledge which is gained by discussion, preparatory to action."[69]

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[68] Historical Office, Bureau of Public Affairs, U.S. Department of State, comp., Human Rights -- Unfolding of the American Tradition: A Selection of Documents and Statements (Washington, D.C.: U.S. Department of State, 1968), 1.

[69] Ibid.

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ABSTRACT

SUPREME COURT JUSTICE SANDRA DAY O'CONNOR'S FIRST AMENDMENT APPROACH TO FREE EXPRESSION: A DECADE IN REVIEW

Although Justice Sandra Day O'Connor's legal approach was well-documented before her Supreme Court appointment, the manner in which she would apply her legal orientation to constitutional issues, especially first amendment cases focusing on free speech and press issues, remained relatively unknown. O'Connor's decisions in approximately 100 of these cases have greatly influenced individual litigants and the functioning of the American constitutional system.

This paper analyzes Justice O'Connor's approach to freedom of expression cases during her first decade as a Supreme Court Justice. It examines all of her 21 written majority, concurring, and dissenting opinions to determine a pattern in her rulings and to predict how she will rule in future such cases.

While a study based solely on Justice O'Connor's written opinions cannot be conclusive, this study suggests her opinions reflect a coherent theory of constitutional interpretation supporting Alexander Meiklejohn's view that the first amendment's primary aim is to protect political speech. Justice O'Connor shows the strongest support for first amendment protections in her opinions in political expression cases involving the press.

If her past record is any indication of her views, one can expect O'Connor to continue to be a strong supporter of first amendment press rights.

SUPREME COURT JUSTICE SANDRA DAY O'CONNOR'S
FIRST AMENDMENT APPROACH TO FREE EXPRESSION:
A DECADE IN REVIEW

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Supreme Court Justice Sandra Day O'Connor's First Amendment Approach to Free Expression: A Decade in Review

INTRODUCTION AND OVERVIEW

Justice Sandra Day O'Connor is celebrating her 10th anniversary on the Supreme Court. Just over ten years ago, September 21, 1981, O'Connor became the first female Supreme Court Justice in American history. The media fanfare following her nomination and appointment often focused on her gender. While many journalists and politicians dismissed O'Connor as the Court's "female token," nominated by former President Ronald Reagan in an alleged attempt to improve his party's "gender gap," others focused on how a female perspective might influence a predominantly white, male Court.

Studies of O'Connor's opinions during her first few terms as a Supreme Court Justice claim that her gender and personal experiences with sex discrimination may have led to her generally more supportive role toward women in gender-based discrimination cases than her male counterparts. For example, O'Connor, after graduating third in her class from Stanford University, could not find a job as a lawyer in the private sector. However, these studies also indicate that gender-based cases are the only type in which O'Connor's gender and gender-related experiences seem to have had a significant bearing on her legal opinions.[1]

The majority of Justice O'Connor's opinions seem to be based on her individualized, conservative style of jurisprudence gained from her varied, rich state legislative experience as a deputy county attorney in San Mateo County, California, a private-practice attorney in Phoenix and an Arizona state senator.[2]

Although O'Connor's legal approach was well-documented before her Supreme Court appointment, the manner in which she would apply her legal orientation to constitutional issues, especially first amendment cases focusing on freedom of speech and press issues, remained relatively unknown. Freedom of expression cases rarely appeared on Arizona Court of Appeals dockets.

On the contrary, a large portion of the Court's dockets during the past 10 years has focused on expression cases. These cases varied dramatically, ranging from challenges to doctors' rights to advise patients about abortions, to state rights to place a special tax on newspapers or cable. O'Connor's decisions in approximately 100 of these cases, including her 21 written opinions, have greatly influenced not only individual litigants, but the functioning of the American constitutional system as well.

This paper analyzes Justice O'Connor's approach to freedom of expression cases during her first decade as a Supreme Court Justice. It examines all of her written opinions during this time frame, 21 majority, concurring, and dissenting opinions, in an attempt to determine a pattern in her rulings and to predict how she will rule in future such cases.

For purposes of the study, the freedom of expression cases have been classified into poltical and nonpolitical expression categories. Cases classified as "political expression" fell into one of the following subcategories: (1) a type of speech necessary to ensure "that debate on public issues. . .will be uninhibited, robust, and wide open," including "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials";[3] (2) press and public access to information about all government branches' activities; or (3) the right to spend money on prefered candidates or issues and/or to affiliate with others in support of candidates or issues. If a case did not fit into one of these categories, it was classified as nonpolitical.

Section I examines Justice O'Connor's general legal orientation and jurisprudence. Justice O'Connor strives for a more restrained Court. Her approach echoes her philosophy that the Court should further limit its judiciary interference into the functioning of the federal government's coordinate branches. Justice O'Connor's approach to federalism is illustrated by her attempts to protect state government functions. Justice O'Connor also argues for limited constitutional protection for individuals. These views lead to Justice O'Connor's general judicial approach: She attempts to protect government interests, especially those of the states, from extensive court regulations. And when balancing individual rights and government interests, she tends to favor the latter.[4]

Section II illustrates the links between her legal orientation and her first amendment approach. Justice O'Connor tends to apply her basic judicial approach directly to free expression cases.[5]

Section III examines whether Justice O'Connor's judicial approach is influenced by a theoretical stance that allows extra protection for political speech. While a study based solely on Justice O'Connor's written opinions cannot be conclusive, the present study suggests that her opinions reflect a coherent theory of constitutional interpretation supporting Alexander Meiklejohn's view that the first amendment's primary aim is to protect political speech.[6]

I. JUSTICE O'CONNOR'S LEGAL ORIENTATION/JURISPRUDENCE

Justice O'Connor's attempts to limit the judiciary's interference with the federal government's coordinate branches underline many of her legal opinions. This approach is based on her strong belief in the need for a more restrained Court.[7] The judicial restraint she tends to exercise while deciding cases is illustrated by her predominantly procedural approach.

In every Supreme Court case, each Justice needs to consider two important, different issues: a case's substantive legal questions and its particular procedural history. Justices who emphasize one of these aspects over another may expose their views on the Supreme Court's role. When Justices emphasize substantive legal questions over procedural ones, they may be suggesting an aggressive desire for the Court to rule on specific substantial legal questions. On the contrary, when Justices, as O'Connor, emphasize a procedural background approach, they may be suggesting that specific substantive results are less important than procedural ones. This approach suggests the Court should resolve legal questions only when absolutely necessary.[8]

Although Justices have used the procedural approach to mask substantive positions and to promote a desired result without having to openly defend them, no studies on O'Connor's legal approach suggest that she employs this tactic.

O'Connor's tendency toward a procedural approach, along with her approach to stare decisis and statutory construction, reflect her adherence to traditional limitations on judicial conduct. Although Justice O'Connor technically adheres to such traditional limitations, she also tends to stretch them.

For example, she does not limit her procedural approach to each case's legal context. She also focuses in on each case's political context or posture within the constitutional system. When examining cases, she often takes notice of the crucial responsibilities of officials in other levels and branches of government. She then reaches conclusions from those responsibilities that limit the scope of judicial power.[9]

Legal scholars Cordray and Vradelis summarize this approach as follows:

> Her approach transcends traditional judicial restraint: Not only should the Court avoid ruling on substantive legal issues where possible, but the Court should also interpret these issues, and the Constitution itself, so as to limit judicial intrusions upon the coordinate branches of government. This position denies that the Court's role

> should be shaped merely by its responsibility to protect individual rights. Instead, the Court must also respect the democratic exercise of the power to govern. According to this view, the power is reposed primarily in the politically responsible branches of government and must not be unduly hindered by the aggressive exercise of judicial power.[10]

Justice O'Connor's paradoxical approach can be confusing. On one hand, she strongly supports "traditional" judicial restraint. However, on the other hand, she sometimes promotes "activist" judicial restraint, radical limitations in an attempt to limit judicial power over government functions.[11]

"Traditional" Judicial Restraint

Justice O'Connor practices traditional judicial restraint in many ways. First, she often writes concurring opinions in an attempt to limit the Court's power. For example, in California v. Trombetta, her concurring opinion summarized the Court's decision as comprising only three "well-settled propositions."[12]

Second, she often protests when either the Court settles issues she believes are being tried in the wrong place or when it makes decisions that she doesn't deem necessary to dispose of a case.[13] For example, in Philko Aviation, Inc. v. Shacket, Justice O'Connor joined the Court's opinion except insofar as it suggested a resolution of an issue not presented to it.[14] And in Edgar v. MITE Corp., Justice O'Connor rejected the Court's resolution of an issue that she found unnecessary in deciding the case.[15]

Third, Justice O'Connor stresses that the courtroom is often not the best setting for resolving legal issues. In Firefighters Local Union No. 1784 v. Stotts, she strongly suggested that this case, and many others, should be settled voluntarily.[16]

O'Connor's adherence to traditional judicial restraint is further defined by her approach to stare decisis and statutory construction.

When in her stare decisis mode, she is often reluctant to disturb prior decisions that she does not agree with, especially when normal procedures have supported such decisions. For example, in Patsy v. Board of Regents, Justice O'Connor's concurring opinion "reluctantly" agreed that the exhaustion of state administrative remedies wasn't a prerequisite to a specific action, thus supporting the Court's settled interpretation of congressional intent. However, while supporting the Court, she declared that she found this policy unsound at best.[17]

Although O'Connor is often reluctant to disturb prior decisions, this reluctance doesn't prevent her from reaching substantive issues. O'Connor's strong dissent in City of Akron v. Akron Center for Reproductive Health, Inc., one of three companion abortion cases, illustrated her willingness, with sufficient justification, to depart from the principle of stare decisis.[18] In this case, the Court reaffirmed its Roe v. Wade decision, which established a trimester approach for determining the permissible boundries of abortion laws.[19] Although Justice O'Connor agreed with the Court's argument that stare decisis is one of the most important judicial foundations, she asked the Court to reject Roe v. Wade's trimester approach since it was based on "a completely unworkable method of accomodating the conflicting personal rights and compelling state interests that are involved in the abortion context."[20] Justice O'Connor attempted to legitimize her request by highlighting past decisions that applied the stare decisis principle less rigidly in constitutional cases, especially when the Court recognized previously faulty logic.

Justice O'Connor's approach to statutory construction is marked by her constant attempts to limit judicial interference into the legislative process. She generally attempts to interpret statutes in a manner which limits judicial power. When examining statutory language, O'Connor often follows the general rule that the analysis "must begin with the language of the statute itself and that absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive."[21]

She illustrates her "plain meaning" approach in Immigration and Naturalization Service (INS) v. Phinpathya.[22] Here, the INS attempted to deport a Thai couple. The couple fought this attempt, claiming they had been "physically present" in America for more than seven years. They argued that since aliens must live in America for seven continuous years to become American citizens, the American government had no right to deport them. The immigration judge determined that while the husband met this continuous seven-year requirement, the wife did not, due to a short vacation abroad. Accordingly, the judge dismissed the case against the husband, but continued proceedings against the wife.

When the case came before the Supreme Court, Justice O'Connor supported the judge's ruling. She argued that since the law clearly stated the continuous seven-year rule, the Court had no right to make any exceptions to it. She said legislative history supported strict legal interpretations, and if Congress desired less rigid laws, it would have to temper them itself.[23]

As Justice O'Connor stated:

> It is not the function of this Court. . .to apply the finishing touches needed to perfect legislation. Our job does not extend beyond attempting to fathom what it is that Congress produced, blemished as the Court may perceive it to be.[24]

She argued that while the Court has some right to interpret statutory language that makes no "logical sense," it shouldn't interpret statutory language that makes no "policy sense."[25]

"Activist" Judicial Restraint

When Justice O'Connor takes an activist approach to judicial restraint, she seems to promote the philosophy that the greatest threat to the legal system is an increase of federal judicial power. Her goal is to safeguard, whenever possible, the integrity of the separate branches of government. Accordingly, she promotes narrower limits on judicial power and greater deference toward the federal government's coordinate branches.[26]

Justice O'Connor's concern about judicial interference in the legislative process, which is reflected by her "plain meaning" approach to statutory construction, is demonstrated by her approach to judicial review of legislation. She frequently tries to convince the Court to minimize its constitutional blockage of legislative action.

For example, Justice O'Connor promotes the practice of construing statutes to avoid, whenever possible, settling constitutional issues. In her concurring opinion in South Carolina v. Regan, she admitted construing the statute in order not to threaten the Court's original jurisdiction.[27] And in cases in which the Court is forced to strike down legislation and choose among various constitutional provisions to support its action, Justice O'Connor often makes the untraditional argument that the Court should choose the provision least likely to get in the way of further legislative action.[28]

Federalism and State Judiciaries

Since Justice O'Connor has held prominent state government positions, it's no surprise she tries to limit federal action in order to safeguard the many functions of state government. She views the states as individual political units that should be given as much autonomy as possible. This view shapes her approach to the relationship between federal and state courts. Justice O'Connor views fellow judiciaries not as incompetent children, but equal partners struggling to achieve mutual goals. Her high regard for state judiciaries is illustrated by her attempt to prevent the Court from reviewing state cases that have not exhausted state remedies or that the state judiciary has settled on adequate and independent state grounds.

Her exhaustion of state remedies approach is an attempt to ensure that the state judiciary has been given adequate opportunities to resolve cases before federal court intervention is allowed.[29]

On the other hand, her adequate and independent state grounds approach supports the general Court rule that when state judicial claims are valid, the Court should decline review since its decision would not change the state court's. Such a decision would be advisory only, thus placing the Court into an inappropriate authoritarian role. This approach also opposes the occasional Court practice of examining state laws by itself. She argues this practice leads to the Court into deciding unfamiliar issues of state law instead of specific federal questions under review.[30]

Private Rights versus Authority to Govern

Justice O'Connor's strong belief that federal judicial intervention into state judiciary business should be restrained, whenever possible, leads to her view on government versus individual rights. Justice O'Connor tends to defer to government interests when balancing those interests with individuals' rights. She argues individual rights and protections have been interpreted too broadly, while state government's needs have been neglected.[31]

Her approach to constitutional protections further supports her tendency to rule in government's favor. When balancing the collective interest in strong government against the legitimate fear of the potential abuse of government power, she often tips the scale in support of government power.[32]

II. JUSTICE O'CONNOR'S FIRST AMENDMENT DECISIONS

In light of Justice O'Connor's general legal orientation and jurisprudence, one would expect her expression opinions to reflect her tendency to support government interests over individual rights. However, no previous study has explored, in any detail, whether Justice O'Connor's general judicial approach is reflected in her expression decisions. By viewing her expression cases in light of her judicial approach, the present study suggests that Justice O'Connor approaches expression cases in much the same manner as most other types of cases, with exceptions when dealing with political speech and press issues.

This section focuses on how Justice O'Connor's general judicial approach is applied in expression cases.

"Traditional" Judicial Restraint

Justice O'Connor practiced traditional judicial restraint in the majority of the 21 expression opinions examined for this study. In these cases, she demonstrated her tendency to interpret each piece of legislation according to its "plain meaning;" to avoid resolving constitutional issues; to criticize the Court for resolving issues that, in her opinion, should have been settled at the state level; and to avoid disturbing prior decisions.

Justice O'Connor's concurring opinion in Brockett v. Spokane Arcades, Inc. illustrates many of these tendencies, especially those of adhering to procedural history and to defer cases to the state level.[33] In addition, Justice O'Connor's opinion in Frisby

v. Schultz illustrates her tendency to support each statute's "plain meaning."[34]

In Brockett, individuals and corporations supplying sexually-oriented movies and books asked the Court to declare facially invalid a new Washington state obscenity statue. Justice O'Connor rejected this first amendment challenge, basing her argument on both procedural history and what she called the Court's "error" of ruling on a case based on unresolved "questions in state law."[35] She condemned the Court for hearing this case before Washington state courts were given the opportunity to do so. She argued that:

> In Railroad Commission v. Pullman Co.[36] the Court held that where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions (see also Hawaii Housing Authority v. Midkiff[37]). This doctrine of abstention acknowledges that federal courts should avoid the unnecessary resolution of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law.
>
> Attention to the policies underlying abstention makes clear that in the circumstances of these cases, a federal court should await a definitive construction by a state court rather than precipitously indulging a facial challenge to the constitutional validity of a state statute.[38]

In addition, Justice O'Connor argued that cases such as Brockett should first be heard by state bodies. State bodies do not only possess a better understanding of state statutes, but it's their rightful duty to grapple with local statutes, such as with obscenity, that affect the quality of life in their own specific region. She stated that:

> My strong belief in deferring to the construction of a state statute given it by the lower federal courts. . . reflects our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective states. . . . There can be no doubt that a state obscenity statute concerns important state interests. Such statutes implicate "the quality of life and the total community environment, the tone of commerce in the city centers and, possibly, public safety itself."[39]

In Frisby v. Schultz, Justice O'Connor demonstrated her constant attempts to determine, as clearly as possible, each statute's legal intentions and/or "plain meaning."[40] In this case, Justice O'Connor stated the majority opinion that a municipal ordinance prohibiting picketing in front of any specific residence, while allowing more general picketing in residential areas, serves significant government interests in protecting residential privacy and is narrowly tailored. Accordingly, the ordinance did not violate the first amendment. In typical fashion, Justice O'Connor supported her argument with a strict legal interpretation. She argued that:

> The ordinance. . .cannot be read as containing an implied exception for peaceful labor picketing. Its use of the singular form of the words "residence" and "dwelling" suggests that it is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. The lower court's contrary interpretation of the ordinance. . .constitutes plain error, and runs afoul of the well-established principle that statutes will be intepreted to avoid constitutional difficulties.
>
> Viewed in the light of the narrowing construction, the ordinance allows protesters to enter residential neighborhoods, either alone or marching in groups; to go door to door to proselytize their views or distribute literature; and to contact residents through the mails or by telephone, short of harassment.[41]

Justice O'Connor's tendency to practice traditional judicial restraint is reflected in her many approaches to free expression cases. First, she writes many concurring opinions limiting the Court's power. For example, in Globe Newspaper Co. v. Superior Court, her concurring opinion supported first amendment protection for the right of the public and press to attend criminal trials, but rejected any broader implications.[42]

Second, she protests the Court's decision to hear cases that she claimed were wrongly before the Court and/or the Court unnecessarily ruled on. For example, in Peel v. Attorney Registration and Disciplinary Commission Of Illinois, the Court ruled that attorneys had the first amendment right, under proper commerical speech standards, to advertise certification as trial specialists by the National Board of Trial Advocacy (NBTA).[43] Taking the opposite position, Justice O'Connor's dissenting opinion sided with the state court's argument that it had a better idea than the Supreme Court of whether such legal advertisements would mislead its residents. Accordingly, she argued that the Court should honor the lower court's previous decision.

Third, Justice O'Connor's approach to stare decisis is illustrated by her reluctance to disturb prior decisions. The O'Connor opinion that comes closest to supporting this assertion is found in Rust v. Sullivan, one of the Court's most recent, controversial decisions.[44] In this case, the Court voted 5-4 to uphold federal regulations that deny specific federal funding to family planning clinics that mention abortion as a legitimate family planning method. Although Justice O'Connor had previously stated her personal opposition to abortion and, in Rust, welcomed future, "more explicit" legislation questioning a woman's right to an abortion, she wrote a dissenting opinion refusing to support these regulations.

She based her opposition on the fact that these regulations assaulted an 18-year tradition that required family planning clinics to provide abortion information and that the regulations were based on legislation so ambiguous that they would have been immediately struck down under less political circumstances.

Regardless of whether or not Justice O'Connor agrees with specific prior decisions, she tends to leave them undisturbed, that is, unless she determines that the Court has supported prior decisions based on faulty logic.[45]

For example, Justice O'Connor claimed that three cases dealing with attorneys' first amendment rights to advertise their services were based on faulty logic. She argued that in all three cases, Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, Shapero v. Kentucky Bar Association, and Peel v. Attorney Regulation and Disciplinary Commission of Illinois, the Court mistakenly based its decisions on the same faulty premises, which were developed in Zauderer.[46]

In Zauderer, the Court's majority opinion argued that:

> An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive. . .advice regarding the legal rights of potential clients.[47]

The Court's ruling was based on its commercial speech analysis in both Central Hudson Gas & Electric Corporation v.

Public Service Commission of New York and In re R.M.J.[48] Central Hudson established that the state is only allowed to prohibit truthful and nondeceptive commerical speech if the restriction directly advances a substantial government interest. In re R.M.J. established a state cannot put an absolute prohibition on certain types of potentially misleading information if this information can also be presented in a nondeceptive manner. The Court argued that the advertising in question was truthful and not misleading and thus its restriction would serve no substantial state interest. It then concluded that less restrictive means exist to prevent attorneys from using misleading legal advice to entice clients. As stated in Warner-Lambert Co. v. FTC, "The States can indentify unfair or deceptive legal advice without banning that advice entirely."[49] Based on the above line of reasoning, the Court ruled against Ohio's ban on attorneys offering unsolicited legal advice.

The Court also used this line of reasoning, its Zauderer precedent, to decide the Shapero and Peel cases. In Shapero, the majority held that the state could not prohibit laywers from soliciting legal business through truthful, nondeceptive letters sent to potential clients known to be facing specific legal problems.[50] In Peel, the majority ruled that attorneys had the first amendment right to advertise their certification as trial specialists by the National Board of Trail Advocacy (NBTA).[51] Both Court decisions relied heavily on the Zauderer precedent. In both cases, the Court based its decisions on its assertion that the commercial speech at hand was constitutionally protected, both items were truthful and not misleading, and the Court had no right to restrict such speech since its restriction would not serve or advance a substantial state interest.[52]

Justice O'Connor wrote dissenting opinions in all three cases. Although she stated that the Court correctly applied Zauderer in both Shapero and Peel, the fact that Zauderer itself was based on faulty logic meant all three decisions were wrongly decided. As Justice O'Connor stated in Shapero:

> I agree with the Court that the reasoning in Zauderer supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should be reexamined.[53]

From the beginning of this string of attorney advertising cases, Justice O'Connor strongly stated her opposition to the Court's line of reasoning. In Zauderer, she claimed the Court's faulty decision was based on its lack of emphasis on the important differences between professional services and consumer products. Justice O'Connor argued that, contrary to the Court's view, unsolicited legal advice is not comparable to free consumer samples distributed to promote sales. She argued that since it's typically much more difficult for a layperson to evaluate quality legal services than free samples, the practice of offering unsolicited legal advice to drum up business is much more likely to be misleading. Attorneys are obliged to provide complete, disinterested advice. Since advice contained in unsolicited, free "legal samples" is likely to be biased, this practice undermines professional standards that states have a substantial interest in maintaining. Given the availability of alternative means for attorneys to publicly comment on legal topics (through speeches, articles, etc.), a ruling against attorneys giving legal advice in advertisements is an appropriate means to help insure that professional judgment, not financial gain, prompts legal advice.[54]

Justice O'Connor used her own line of reasoning in Zauderer as a precedent supporting both of her dissenting opinions in Shapero and Peel. She said that the Shapero decision "had even more potential for abuse (than Zauderer)," thus the state had a greater substantial interest in striking it down.[55] By applying the Zauderer precedent to Shapero, Justice O'Connor claims that:

> The (Court), by invalidating a similar rule against targeted, direct-mail advertising, wrapped the protective mantel of the Constitution around practices that have even more potential for abuse.[56]

She said a normal lay person usually understands the underlying sales pitch of normal "personalized form letters." However, it's more difficult for him to distinguish between such a sales pitch and legitimate legal advice when such a letter states an attorney's familiarity and interest in his specific legal problem. Since this practice is even more likely to mislead than the practice in Zauderer, the Court had even more reason to reject it.

Justice O'Connor used her same argument for rejecting Zauderer and Shapero in the Peel case, in which she called the majority decision "(Y)et another (negative) example. . .of rote application of the commerical speech doctrine."[57] She argued that since the mention of NBTA certification could easily mislead a lay person, the Court, once again, should have applied this "fact" to her Zauderer line of reasoning and, accordingly, should have rejected this practice.

Justice O'Connor, on occasion, is also known to stretch the limits of traditional judicial restraint. In such cases, she attempts to determine which officials at various government levels and branches should be held responsible for the issue at hand. She then argues these officials, not the Court, should grapple with the specific issue, thus limiting the scope of judicial power.

Justice O'Connor clearly illustrates this approach in the Board of Education v. Pico case.[58] In this case, her dissenting opinion rejected a first amendment challenge to a school board's decision to remove certain books from its curriculum and library. She based her argument on "the broad scope of the board's responsibilities."[59] She argued that:

> If the School Board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it. . . . In this case the government is acting in its special role as educator.
>
> I do not personally agree with the Board's action with respect to some of the books in question here, but it is not

> the function of the courts to make the decisions that have been properly relegated to the elected members of the school boards. It is the school board that must determine educational suitability, and it has done so in this case.[60]

"Activist" Judicial Restraint

Justice O'Connor's activist approach to judicial restraint is also reflected in her expression cases. This approach is illustrated in her frequent attempts to convince the Court to minimize its constitutional blockage of legislative action and to avoid, whenever possible, settling constitutional issues.

For example, in Rust v. Sullivan, the Court upheld the Secretary of Health and Human Services' regulations that denied specific federal funding to family planning services presenting abortion as a family planning option. Justice O'Connor's dissenting opinion scolded her brethren for ignoring two well-established "fundamental rules of judicial restraint": to strike down regulations based on clearly ambiguous legislation and to restrain from considering constitutional questions under such circumstances.[61] Justice O'Connor argued that:

> This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with `great gravity and delicacy' when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.
>
> In this case we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation. If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do

> before it has chosen to do it. It is enough in this case to conclude that neither the language nor the history of these regulations compels the Secretary's interpretation, that the interpretation raises serious First Amendment concerns.[62]

Federalism and State Judiciaries

The present study supports findings that Justice O'Connor's decisions are littered with references and actions supporting her view that federal actions should be limited in order to safeguard the functions of state government. Accordingly, she attempts to prevent the Court from reviewing cases that haven't exhausted state remedies or that the state judiciary has found to be on "adequate and independent state grounds."[63]

In Brockett v. Spokane, Justice O'Connor's concurring opinion criticized the Court for not exhausting state remedies. She argued that the Court "erred" by ruling on a case based on unresolved questions of state law instead of rightfully refusing it.[64] The Court's acceptance of the case denied the state courts their right to attempt to clarify state law before having the matter taken out of their hands. Justice O'Connor stated:

> Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law.[65]

In Brockett, Justice O'Connor also criticized the Court for overstepping its bounds by second-guessing state law. She argued that:

> (The Court's) absention may be required `in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative

> decisions on questions of state law and premature constitutional adjudication.' Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as in the case here, the state courts stand willing to address questions of state law on certification from a federal court.
>
> In my view , the state court should have been afforded an opportunity to construe the Washington moral nuisance law in the first instance.[66]

In Peel v. Attorney Registration, Justice O'Connor argued in her dissenting opinion that the state judiciary had already appropriately ruled on the attorney-advertising certification issue.[67] Accordingly, the Court should have supported the Supreme Court of Illinois' decision. Justice O'Connor stated that:

> Charged with the duties of monitoring the legal profession within the State, the Supreme Court of Illinois is in a far better position than is this Court to determine which statements are misleading or likely to mislead. Although we are the final arbiters on the issue whether a statement is misleading as a matter of constitutional law, we should be more deferential to the State's experience with such statements. Illinois does not stand alone in its conclusion that claims of certification are so misleading as to require a blanket ban. At least 19 States and the District of Columbia currently ban claims of certification.[68]

Private Rights versus Authority to Govern

Cordray and Vradelis predicted in their 1985 study of Justice O'Connor's jurisprudence that if her basic legal approach was strongly reflected in her first amendment decisions, her predominate approach to expression cases would be as follows:

> Justice O'Connor would tend to decide expression cases by accepting the competing interests between government and individual rights presented by various Justices and then would argue that the Court's majority opinion had struck a balance too protective of individual rights.[69]

The present study supports this hypothesis. In 14 of the 21 cases examined, Justice O'Connor clearly ruled against first amendment challenges promoting individual rights. In all but one of these rejections, she took the approach of agreeing with many of the Justices' arguments about the individual's and government's competing interests, yet ruled against the Court's majority opinions on the grounds they were too protective of individual rights.

Of the seven remaining cases, only three, all press cases, illustrate any type of lesser trend. Justice O'Connor began her analysis of all three cases by directly tackling the constitutional question at hand, either by interpreting the Framers' first amendment intentions or presenting relative precedents that have ruled in favor of the press. She then ruled in the press' favor. The only press-related case within the present study that doesn't fit this scenario is Leathers v. Medlock, which will be discussed later.[70]

Justice O'Connor's tendency to support the Justices' scenario of conflicting government and individual rights, yet to criticize the Court for majority opinions favoring the latter, is illustrated in Brown v. Socialist Workers `74 Campaign Committee and United States, Petitioner v. Kokinda.[71]

In Brown, the minor Socialist Workers Party challenged an Ohio statute requiring candidates for political office to disclose all campaign-fund contributors and recipients.[72] The Court found this statute unconstitutional, based on the first amendment's inferred right to privacy and the absence of a compelling state interest to justify mandatory disclosure.

Justice O'Connor, in partial dissent, disputed the scope of the Court's decision.[73] Although she agreed with the Court that the statute was unconstitutionally applied to require disclosure of minor party contributors, she argued she would have upheld compulsory disclosure of campaign-fund recipients. She accepted the Court's version of competing governmental and individual interests, yet critcized the Court for being too protective of individual rights. Justice O'Connor argued that state interests in preventing improper electoral conduct remained strong even when the statute was applied to minor parties. After all, minor parties were just as likely as major ones to practice corrupt activities that could affect an election's outcome.

Finally, she argued that recipients' associational rights were less threatened than contributors'. Recipients are typically oridnary businesses or active campaigners. As such, their political beliefs are easily ascertained and thus not threatened by disclosure. However, she argued, contributors' political views are only exposed when they contribute to a campaign and such contributions are made public.

Justice O'Connor also seemed to side with judicial arguments about the balance between individual and government rights, then criticize her brethren for being too lenient with individual rights. For example, in Kokinda, her majority opinion argued that the Court of Appeals wrongly overthrew the United States

District Court's decision to prosecute defendants, members of a political advocacy group soliciting contributions on the sidewalk infront of a post office, in clear violation of Postal Service regulations.[74]

Justice O'Connor seemed to acknowledge that the Court of Appeals had adequately described the competing interests between government and individual rights. However, she claimed its "misguided" decision to favor individual rights in this instance was based on its incorrect finding that the sidewalk was a public forum. Based on this assumption, the Court of Appeals applied the time, place, manner test and determined that the government had no significant interest in banning solicitation. Finally, it concluded that the postal regulation was not narrowly tailored to accomplish a specific government interest.

Justice O'Connor led the Court in reversing this decision, arguing that first amendment activity may be regulated, on "reasonable grounds," when the government property in question has not been treated as a traditional public forum or dedicated to first amendment activity.[75] This reasonableness test must then meet nonpublic fora standards: it must be reasonable and non-content based. She argued that the postal sidewalk is not a traditional public forum just because "it resembles the municipal sidewalk across the parking lot from the post office. The sidewalk was constructed solely. . .for passage of individuals with postal business, not as a public passageway."[76] She then attacked the claim, argued by several justices and the defendants, that the Postal Service had indeed dedicated itself to expressive activity, via its normal practice of posting public notices. She argued that:

> The Postal Service has never expressly dedicated its sidewalk to any expressive activity. Postal property has only been dedicated to the posting of public notices on designated bulletin boards. A practice of allowing individuals and groups to leaflet, speak, and picket on postal premises and a regulation prohibiting disruptive conduct do not add up to such dedication. Even conceding that the forum has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, regulation of the reserved nonpublic uses would still require application of the reasonableness test.[77]

Justice O'Connor went on to argue how the regulation met the reasonableness guidelines. She explained that:

> It is reasonable for the Postal Service to prohibit solicitation where it has determined that the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. . . . Whether or not the Service permits other forms of speech, it is not unreasonable for it to prohibit solicitation on the grounds that it inherently disrupts business by impeding the normal flow of traffic. Even if more narrowly tailored regulations could be promulgated, the Service is only required to promulgate reasonable regulations, not the most reasonable or only reasonable regulation possible.[78]

Justice O'Connor's less common approach to expression cases deals with her treatment of press cases. This approach is illustrated by her consideration of the Framers' views toward first amendment protections and/or relative precedents that support press freedom.

In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, she demonstrated her adherence to the Framers' intents underlying the first amendment.[79] Justice O'Connor's majority opinion focused on the purposes of the first amendment, even though the challenged statute was invalidated. In this case, Minnesota imposed a special use tax, instead of a regular state sales tax, on the press' paper and ink products. The tax's special exemptions resulted in heavy tax burdens on a handful of publishers.

Justice O'Connor led the Court in striking down the tax as a violation of press freedoms. Her opinion was based on her analysis of the underlying reasons for the first amendment's protection of the press. After admitting that this approach was anything but traditional since little evidence actually exists concerning the Framers' intentions, she stated: "But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone."[80] She argued such "evidence" is clearly stated by the Framers in the debates over ratification of the Bill of Rights. In these debates, the Framers argue that differential taxation of the press is a specific evil that the first amendment is intended to prevent.

Justice O'Connor then attempted to balance the burden of singling out the press against the state's asserted interest. She said:

> We think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.[81]

In Philadelphia Newspapers Inc. v. Hepps, Justice O'Connor bases her majority opinion on precedents favorable to the press and the philosophy that "speech of public concern is at the core of the First Amendment's protections."[82] In this case, Hepps, a principal stockholder in General Programming Inc., and his associates, sued the Philadelphia Inquirer for libel due to its series of investigative articles alledging their connections with organized crime and attempts to influence Pennsylvania's governmental process. The Court ruled against Hepps and associates since the story was a matter of public concern and they were unable to prove the alleged defamation false. The Court argued that:

> The First Amendment requires anyone who sues the media for libel in connection with a matter of public concern to bear the burden of proving with clear and convincing evidence that the defamatory statements are false. State courts are not permitted to hold to the common law assumption of falsity in media libel cases. Strongly suggested is that such action, directed at news media treatment of a public issue, cannot survive unless the plantiff has convincing evidence of a false and defamatory assertion of fact.[83]

Justice O'Connor's arguments were based on precedents supporting press interests, such as Gertz v. Welch and New York Times Co. v. Sullivan,[84] and promoted the philosophy that the press must be given the type of extra protection that the Court granted it in Hepps in order to avoid a harmful chilling effect. She stated that:

> A chilling effect would be antithetical to the First Amendment's protection of true speech on matters of public concern. We believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could `only result in a deterrence of speech which the Constitution makes free.'[85]

Justice O'Connor argued that although the Hepps ruling would at times result in the press escaping libel charges due to the plaintiff's inability to prove charges false, this shortcoming is a price worth paying in order to retain a freer press. She explained that:

> The First Amendment requires that we protect some falsehood in order to protect speech that matters. . . . Here the speech concerns the legitimacy of the political process, and therefore clearly `matters.' Speech of public concern is at the core of the First Amendment protections.[86]

III. O'CONNOR'S APPROACH TO POLITICAL VERSUS NONPOLITICAL SPEECH

Now that the present study has indicated that Justice O'Connor's approach to expression cases is similar to her judicial approach to most issues, it's time to examine how her theoretical view of political versus nonpolitical expression influences such decisions.

According to legal scholars Heck and Arledge, who analyzed Justice O'Connor's expression decisions during her first three terms on the Court, Justice O'Connor's approach to expression cases "reflects a coherent theory of constitutional interpretation broadly consistent with Alexander Meiklejohn's view that the primary purpose of the first amendment is the protection of `political speech.'"[87]

Meiklejohn, who advocated one of the most influential theories of first amendment interpretation, argued that the first amendment does not support a right to speak as one chooses, but instead an "unlimited guarantee of the freedom of public discussion."[88] Meiklejohn argues that since the government is founded on the freedom of public discussion, the first amendment applies "only to speech which bears, directly or indirectly, upon issues with which voters have to deal."[89] Accordingly, private speech--speech aimed solely at private gain--does not fall within first amendment protection.

Heck and Arledge supported this theory via three hypotheses. They argued that if Justice O'Connor was more protective of political speech than nonpolitical speech, the following should occur:

> 1. Justice O'Connor would be favorably inclined to support few litigants invoking the protecton of the first amendment for nonpolitical speech, while supporting a substantially higher percentage of first amendment claims involving political speech;
>
> 2. Her opinions will support a theoretical approach to first amendment freedom of expression issues generally consistent with Meiklejohn's "primacy of political speech" position without endorsing his view that the protection of political discussion is absolute;
>
> 3. And she will recognize the greatest degree of first amendment protection when a government regulation directly restricts the activities of the press.[90]

The present study supports Heck and Arledge's theory that Justice O'Connor tends to be more protective of political than nonpolitical speech.

In order to determine Justice O'Connor's theoretical approach to political versus nonpolitical expression cases, the present study's cases were divided into political and nonpolitical categories. For purposes of this study, political expression cases were defined as those containing manifest political content seeking influence on public issues. Expression cases not falling under this definition were categorized as nonpolitical.

Of the present study's 21 cases, nine were classified as political and 12 as nonpolitical. Four of the nine political expression cases focused on press issues (this study contained only four press cases) and three of the nonpolitical expression cases focused on obscenity.

In the majority of nonpolitical expression cases (eight of twelve), Justice O'Connor ruled against individual rights. In the four remaining cases, only one clearly supported individual rights. Of the remaining three, two struck a balance between individual and government rights while the third was vacated and remanded for being overbroad.

In a slight majority of the political expression cases (five of nine), Justice O'Connor ruled in favor of individual rights. Her support for political expression cases was strongest when they were press related. In three out of four political press cases (all press cases were categorized as political), she ruled in favor of individual and press rights over government ones.

The present study clearly suggests Justice O'Connor is more likely to support government rights in nonpolitical cases than in political cases. Conversely, it also clearly suggests she is more likely to support individual rights in political cases. What remains unclear is the extent of Justice O'Connor's commitment to protecting nonpress-related political speech.

In the present study's nine political cases, Justice O'Connor decided in favor of individual rights in a 5-4 majority. Three of the five majority votes were press-related. If the press cases were not included in this political category, Justice O'Connor would have ruled in favor of individual rights in only two of five political speech cases. This may indicate that Justice O'Connor's interest in protecting political speech is reserved mainly for press-related issues.

This assertion is further supported by the manner in which Justice O'Connor argues nonpress-related political cases as opposed to press-related political cases. For example, while supporting individual rights in the two nonpress-related political cases, Federal Election Commission v. Massachusetts Citizens for Life and Rust v. Sullivan, she does not preach the dire need to protect political speech, as she does in the majority of the political press cases.[91]

In Massachusetts Citizens, Justice O'Connor's decision, concurring in part and in the judgment, lacks the type of intense commitment to political speech that the present study's numbers suggest. In this case, the Federal Election Commission brought enforcement proceedings, under the Federal Election Campaign Act, against a nonprofit organization for publishing a newsletter urging readers to vote "pro-life" in an upcoming primary election. The Court argued that although this newsletter violated the section of the Act prohibiting direct expenditure of corporate funds in connection with elections to public office, the section it violated was applied in violation of the first amendment.[92]

While Justice O'Connor "signed on" to several of the Court's major arguments, which dealt with the importance of political speech, her concurring opinion's defense of political speech was lackluster. She argued that:

> In my view, the significant burden on the Mass Citizens for Life (MCFL) in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the Act. . . . As the Court has described, engaging in campaign speech requires MCFL to assume a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups such as MCFL with few or no `members.' These additional requirements do not further the Government's informational interest in campaign disclosure, and, for the reasons given by the Court, cannot be justified by any of the other interests identified by the Federal Election Commission.
>
> Although the organizational and solicitation restrictions are not invariably an insurmountable burden on speech, in this case the Government has failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression.[93]

Justice O'Connor spoke much more passionately in her dissenting opinion in Rust v. Sullivan. However, her outrage was directed at her brethren's lack of decorum in deciding this politically spotlighted case, not at the need to protect political speech.[94]

Justice O'Connor wrote opinions in four political press cases. Two of these, Hepps and Globe Newspapers, focus on press content. The other two, Minneapolis Star and Leathers, focus on taxation of the media. Justice O'Connor wrote the majority opinion in three out of four of these cases.[95] (She wrote the majority opinion in two out of five nonpress political cases.) As the present study indicates, Justice O'Connor's approach to press cases reflects her view that the greatest degree of first amendment protection should be given to the press.

The manner in which Justice O'Connor argues Minneapolis Star strongly suggests her greater support for political cases involving the press. In this case, Justice O'Connor zealously promoted press freedom as a means to protecting political core speech.[96]

As stated in the previous examination of Justice O'Connor's judicial approach, she began this argument by suggesting the Framers' would not have agreed with the Minnesota tax. According to O'Connor, her argument is supported by the Framers' debates on the need for the Bill of Rights. The Antifederalists support for the Bill of Rights led to its adoption. As Justice O'Connor stated:

> There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment. . . . The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:
>
>> "I confess I do not see in what cases the Congress can, with any pretense of right, make a law to suppress the freedom of the press; though I am not clear that Congress is restrained from laying any duties whatever in printing and from laying duties particularly heavy on certain pieces printed...."[97]
>
> The fears of the antifederalists were well founded. A power to tax differentially. . .gives a government a powerful weapon against the taxpayer selected. When the State imposes a general applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.

> But when the State singles out the press, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes is acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.[98]

Justice O'Connor's arguments in political press cases focus more on the need to protect core political speech than her nonpress political speech cases.

In Hepps, in which a major stockholder and associates sued the Philadelphia Inquirer for libel, Justice O'Connor's majority opinion is based on the philosophy that speech of public concern holds special first amendment protections. In Hepps, O'Connor delivers a direct appeal for protecting political speech via a press case rather than a nonpress speech case.

Justice O'Connor argued that:

> ...the Constitution requires us to tip (the scale) in favor of protecting true speech. To ensure that true speech on matters of public concern is not deterred, we (the Court) hold that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[99]

Although the present study indicates that Justice O'Connor has the greatest tendency to promote political press cases, her recent decision in Leathers v. Medlock suggests O'Connor is not always supportive of the press. Her majority opinion in this case, favoring government interests, focuses on taxation, not content.[100] Her approach to taxing the media in this case contradicts her majority opinion in Minneapolis Star.[101] In Minneapolis Star, Justice O'Connor argued that a selective press tax was unconstitutional. Although the *Leathers* case concerned a selective tax on cable, not newspapers, Justice O'Connor argued that cable should be dealt with in the same manner as the the press. Then, in direct opposition to the *Minneapolis Star* opinion, she called a selective cable tax constitutional. Justice O'Connor explained that:

> Although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, the fact that it is taxed differently from other media does not in itself raise First Amendment concerns.[102]

Although Leathers may indicate a new anti-press stance for O'Connor, the fact that this most recent case concentrated on taxation and not content makes it difficult to predict if her press attitudes have changed. O'Connor's strong support of the press in the other three cases, which focused mostly on content, indicates they have not.

CONCLUSIONS

This study analyzes Justice Sandra Day O'Connor's approach to First Amendment speech protections. Twenty-one cases in which O'Connor wrote opinions were examined. Twelve were non-political expression cases, nine dealt with political expression. The political expression cases were further divided into political speech and political press categories. Four of the nine political expression cases involved the press, two focusing on taxation issues, two on content.

Based on her written opinions, O'Connor is more protective of political speech than nonpolitical speech. In the majority of non-political cases, she ruled against individual rights to free speech. In the majority of political expression cases, she ruled in favor of individual rights. She seems to follow Meiklejohn's "primacy of political speech" position without endorsing his view that the protection of political discussion should be absolute. Furthermore, O'Connor shows the strongest support for first amendment protections in her opinions in political expression cases involving the press.

If her past record is any indication of her views, one can expect O'Connor to continue to be a strong supporter of first amendment press rights, Leathers not withstanding.

ENDNOTES

1. Edward V. Heck and Paula C. Arledge, Justice O'Connor and the First Amendment, 1981-84, Pepperdine Law Review, 13 (1986):996-97.

2. Ibid., 997.

3. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

4. R. Cordray and J. Vradelis, "The Emerging Jurisprudence of Justice O'Connor, University of Chicago Law Review 52 (1985):391-92.

5. Ibid., 448.

6. Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (New York: Harper, 1960).

7. Cordray and Vradelis, 394.

8. Ibid., 392-93.

9. Ibid., 393-94.

10. Ibid., 393.

11. Ibid., 394.

12. California v. Trombetta, 104 S.Ct. 2528, 2536 (1984).

13. Cordray and Vradelis, 395.

14. Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 414-15 (1983).

15. Edgar v. MITE Corp., 457 U.S. 624, 655 (1982).

16. Firefighters Local Union No. 17684 v. Stotts, 104 S.Ct. 2576, 2593-94 (1984).

17. Patsy v. Board of Regents, 457 U.S. 496, 517 (1982).

18. City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 454 (1983).

19. Roe v. Wade, 410 U.S. 113 (1973).

20. Cordray and Vradelis, 399.

21. Ibid., 403.

22. Immigration and Naturalization Service (INS) v. Phinpathya, 104 S.Ct. 584 (1984).

23. Ibid.

24. Federal Bureau of Investigation (FBI) v. Abramson, 456 U.S. 615, 644 (1982).

25. Cordray and Vradelis, 405.

26. Ibid., 408.

27. South Carolina v. Regan, 104 S.Ct. 1107, 1125 (1984).

28. Cordray and Vradelis, 418.

29. Justice Sandra Day O'Connor, "Our Judicial Federalism," Case Western Law Review 35 (1984-5):1-12.

30. Ibid.

31. Cordray and Vradelis, 437.

32. Ibid.

33. Brockett v. Spokane Arcades, Inc., Et Al., 472 U.S. 491 (1984).

34. Frisby v. Schultz, 108 S.Ct. 2495 (1988).

35. 472 U.S. 508 (1984).

36. Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

37. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236-237 (1984).

38. 472 U.S. 508 (1984).

39. Ibid.

40. 108 S.Ct. 2500 (1988).

41. Ibid.

42. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 (1982).

43. Peel v. Attorney Registration and Disciplinary Commission of Illinois, 110 S.Ct. 2281 (1990).

44. Rust v. Sullivan, 111 S.Ct. 1759 (1991).

45. Cordray and Vradelis, 399.

46. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 105 S.Ct. 2265 (1985); Shapero v. Kentucky Bar Association, 108 S.Ct. 1916 (1988); and 110 S.Ct. 2281 (1990).

47. 105 S.Ct. 2265 (1985).

48. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 100 S.Ct. 2343 (1980); In re R.M.J., 102 S.Ct. 929 (1982).

49. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir., 1977).

50. 108 S.Ct. 1916 (1988).

51. 110 S.Ct. 2281 (1990).

52. 110 S.Ct. 2297 (1990).

53. 108 S.Ct. 1925 (1988).

54. Ibid.

55. 108 S.Ct. 1926 (1988).

56. Ibid.

57. 110 S.Ct. 2297 (1990).

58. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982).

59. 457 U.S. 853 (1982).

60. 457 U.S. 921 (1982).

61. 111 S.Ct. 1788 (1991).

62. 111 S.Ct. 1789 (1991).

63. Cordray and Vradelis, 423.

64. 468 U.S. 510 (1984).

65. Ibid.

66. Ibid.

67. 110 S.Ct. 2298 (1990).

68. Ibid.

69. Cordray and Vradelis, 437.

70. Leathers v. Medlock, 111 S.Ct. 1438 (1991).

71. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982); and U.S. v. Kokinda, 110 S.Ct. 3115 (1990).

72. 459 U.S. 87 (1982).

73. Ibid.

74. 110 S.Ct. 3115 (1990).

75. Ibid.

76. 110 S.Ct. 3116 (1990).

77. Ibid.

78. 110 S.Ct. 3117 (1990).

79. Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 103 S.Ct. 1365 (1983).

80. 103 S.Ct. 1371 (1983).

81. Ibid.

82. Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1564 (1986).

83. 106 S.Ct. 1564 (1986).

84. Gertz v. Welch, 418 U.S. 323 (1974); and New York Times v. Sullivan, 376 U.S. 254 (1964).

85. 106 S.Ct. 1564 (1986).

86. Ibid.

87. Heck and Arledge, 995.

88. Meiklejohn, 37.

89. Ibid., 79.

90. Heck and Arledge, 1005.

91. Federal Election Commission v. Massachusetts Citizens for Life, Inc., 107 S.Ct. 616 (1986); and 111 S.Ct. 1759 (1991).

92. 107 S.Ct. 616 (1986).

93. 107 S.Ct. 632 (1986).

94. 111 S.Ct. 1789 (1991).

95. 457 U.S. 596 (1982); 103 S.Ct. 1365 (1983); 106 S.Ct. 1558 (1986); and 111 S.Ct. 1438 (1991).

96. 103 S.Ct. 1365 (1983).

97. Richard Henry Lee, "Observation Leading to a Fair Examination of the System of Government, Letter IV," reprinted in 1 B. Schwatrz, The Bill of Rights: A Documentary History 466, 474 (1971).

98. 103 S.Ct. 1371 (1983).

99. 106 S.Ct. 1564 (1986).

100. 111 S.Ct. 1438 (1991).

101. 03 S.Ct. 1367 (1983).

102. 111 S.Ct. 1953 (1991).

The Scope of Independent Appellate Court Review in Public Figure Libel Cases

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The Scope of Independent Appellate Court Review in Public Figure Libel Cases

Juries have not been particularly sympathetic to the media in deciding libel cases. While the trend is toward fewer media defendants going to trial, once there, they are losing a higher percentage of cases and are facing larger compensatory and punitive damage awards.[1] A recent analysis of 1989-90 cases by the Libel Defense Resource Center (LDRC) showed that the media lost 69% of jury verdicts, up from 58% reported in the two previous years.[2] Even more important is the declining success rate of media libel defendants in the appellate courts. The LDRC report on 1989-90 cases found that 48% of the libel verdicts against the media were upheld in their entirety, a sharp increase from an average of about 25% in prior studies and 38% in 1987-88.[3]

Although this trend is distressing to press interests, appellate court review remains pivotal to reversing media defeats in the trial courts and to reigning in excessive damage judgments. In the 1980s, the number of libel awards appealed by media defendants that were not reversed, remanded, or substantially reduced, was less than 30 percent.[4]

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[1] Average Libel Award Increases Tenfold, PRESSTIME, Oct. 1991, at 30. The average award in the 30 libel cases that went to verdict in the 1989-90 period was nearly $4.5 million--more than 10 times the average amount in 1987-88, when 60 libel cases went to verdict. An earlier LDRC survey of cases in the early 1980s found the average libel award was more than triple the average award for medical malpractice cases, prompting Anthony Lewis to observe: "In short, juries seemed to think that persons whose reputations were wrongfully injured by the press deserved three times the compensation of those whose bodies had been injured by incompetent doctors." See, A. LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 220 (1991).

[2] Average Libel Award Increases Tenfold, *supra* note 1, at 30.

[3] Average Libel Award Increases Tenfold, *supra* note 1, at 30.

These statistical reflections of lower court error support Schauer's observation that "much of contemporary first amendment doctrine, theory, and commentary is devoted to protecting speech from the jury."[5] Media defendants have come to expect favorable outcomes in the appellate courts. But, despite the high level of success, the scope of appellate court review is unsettled. It has become "one of the most critical emerging issues in libel litigation."[6] A narrowing in the scope of appellate review could prove disastrous to the success of media defendants in libel litigation.

This paper examines the application of independent appellate review to actual malice determinations in public figure defamation cases. It begins with a review of the traditional distinction drawn by courts between questions of fact and questions of law. It next examines efforts by the U.S. Supreme Court to provide guidance regarding the scope of independent review and assesses how lower courts have responded. It concludes that additional guidance is needed from the Court on the proper scope of independent review and suggests that special verdicts should be used in jury-based libel trials.

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[4] Average Libel Award Increases Tenfold, supra note 1, at 30.

[5] Schauer, The Role of the People in First Amendment Theory, 74 Calif. L. Rev. 761, 765 (1986).

[6] R. SMOLLA, LAW OF DEFAMATION sec. 12.09[4] at 12-43, (1989 release).

The Fact/Law Distinction

Distinguishing between questions of fact and questions of law has been the longstanding approach to allocating decision-making responsibilities between trial and appellate courts in civil cases.[7] Questions of fact are for trial court juries and judges and are reviewed narrowly and deferentially on appeal.[8] Questions of law are freely reviewed on appeal.[9] Judicial application of the fact/law distinction is often confusing because the two categories are used to describe at least three distinct functions: law declaration, fact identification, and law application.[10]

The traditional allocative function of the fact/law distinction, however, does not fully operate in so-called constitutional fact cases, in which strict adherence to the deference normally owed a lower court's findings of fact would threaten constitutional values.[11]

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[7] Louis, Allocating Adjudicative Decision Making Between the Trial and Appellate Levels: A Unified View of the Scope of Review, The Judge/Jury Question, and Procedural Discretion, 64 N.C. L.Rev. 993 (1986).

[8] Id.

[9] Id.

[10] Monaghan, Constitutional Fact Review, 85 Colum. L.Rev. 229, 234 (1985). Law declaration involves formulation of a proposition that affects not only the immediate case but all others that fall within its terms. Fact identification is a case-specific inquiry into what happened here. It is designed to yield only assertions that can be made without significantly implicating the governing legal principles. Such assertions generally respond to inquiries about who, when, what, and where--inquiries that can be made by a person who is ignorant of the applicable law. Law application involves relating the legal standard of conduct to the facts established by the evidence. Id. at 235-36 (emphasis in original).

In cases involving constitutional issues, the scope of appellate review is expanded. For example, in reversing a conviction for criminal syndicalism in 1927, the U.S. Supreme Court in Fiske v. Kansas[12] said it would review the facts found by a state court when a constitutional issue was so intermingled with the facts as to make it necessary.[13] Cases involving so-called "mixed questions of fact and law," as well as questions of "ultimate" constitutional fact, are subject to expanded independent review by the appellate courts.[14]

Independent Review of Libel Verdicts

The landmark decision in New York Times Co. v. Sullivan[15] was the U.S. Supreme Court's first application of independent appellate review to a libel case. Rejecting the argument that the Seventh Amendment barred reexamination of state courts' findings of fact,[16] the Court said that its duty was not limited to the elaboration of constitutional principles but that it must also, in proper cases, "review the evidence to make certain that those principles have been constitutionally applied."[17] To do so, said the Court, it is necessary to "'make an independent examination of the whole record,' ... so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[18]

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[11] See, e.g., Watts v. Indiana, 338 U.S. 49 (1949) (independent review appropriate to determine if confession was voluntary); Roth v. United States, 354 U.S. 476 (1957) (independent review appropriate to determine if publication was obscene); Niemotko v. Maryland, 340 U.S. 268 (1951) (when there is a question of constitutional rights, court may independently review record).

[12] 274 U.S. 380 (1927).

[13] Id. at 385-386.

[14] See Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982).

[15] 376 U.S. 254 (1964).

Libel scholar David Anderson believes that the expansion of judicial control beginning in the Sullivan case has "had far greater practical effect than the actual malice rule itself."[19] The Court's requirement that actual malice be proven with convincing clarity has had its greatest effect, not on juries, but on judicial review.[20] "The Supreme Court has never explained what the phrase [convincing clarity] means, but it obviously enhances judges' power to overturn jury verdicts that under usual rules would have to be accepted."[21]

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[16] Id. at 285, n.26. The Seventh Amendment provides, in part, that "... no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

[17] Sullivan, 376 U.S. at 285.

[18] Id. (citation omitted) (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[19] Anderson, Is Libel Law Worth Reforming?, 104 U. Pa. L.Rev. 487, 494 (1991).

[20] Id.

[21] Id.

In the years following the Sullivan decision, the Court has frequently exercised its independent review of libel verdicts.[22] Such reviews, however, focused on correcting the (mis)application of the evolving actual malice rule to existing facts;[23] libel judgments against defendants were often found to have applied an erroneous legal standard. Thus, while the post-Sullivan cases led to further norm elaboration on the constitutional rule of actual malice, when Bose Corp. v. Consumers Union of the United States, Inc.[24] came before the Court, "independent appellate review in the context of libel cases ... had not been used to review a lower court's finding of 'pure fact.'"[25]

Bose Corp. v. Consumers Union

The Supreme Court's 6 to 3 decision in Bose acknowledged the strategic importance of appellate review in ensuring the actual malice rule protection established in the Sullivan case. At issue was whether an appellate court was required to follow Rule 52(a) of the Federal Rules of Civil Procedure and therefore bound to accept the findings of fact of a lower court unless those findings were found to be "clearly erroneous."[26] In rejecting Rule 52(a) as the standard governing independent review of libel decisions, the Court said that the appellate review requirement was a rule of federal constitutional law[27] and that:

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[22] See St Amant v. Thompson, 390 U.S. 727 (1968); Time, Inc. v. Pape, 401 U.S. 279 (1971); Herbert v. Lando, 441 U.S. 153 (1979).

[23] See, e.g., Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (question was whether actual malice rule had been correctly applied to the facts); Greenbelt Coop. Publishing Ass'n. v. Bresler, 398 U.S. 6, 11 (1970) (same).

[24] 466 U.S. 485 (1984).

[25] Comments, The Expanding Scope of Appellate Review in Libel Cases--The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice, 36 Mercer L. Rev. 711 (1985).

> The question whether the evidence in the record is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'[28]

While the Bose majority viewed the actual malice determination as one of First Amendment law application, Justice Rehnquist's dissent, joined by Justice O'Connor, argued that the actual malice determination involved questions of pure historical fact, a subjective, state-of-mind determination, best left to the trial judge.[29] Such findings, "appellate courts are simply ill-prepared to make in any context, including the First Amendment context."[30]

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[26] The rule provided that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." Fed. R. Civ. P. 52(a). In 1985, the rule was amended to include "[f]indings of facts, whether based on oral or documentary evidence, shall not be set aside ...." Fed. R. Civ. P. 52(a) (emphasis added). "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Bose, 466 U.S. at 501.

[27] Bose, 466 U.S. at 510.

[28] Id. at 511. Independent review applies whether the lower court fact-finding function was performed by a jury or by a trial judge. See id. at 501.

The Bose case left unanswered many questions regarding the proper scope of independent review. The central unresolved issues concern what it means to review an "entire" lower court record and the deference owed to a judge's or jury's credibility determinations, determinations regarding subsidiary facts, inferences drawn from those facts, and the aggregation of such inferences in determining the ultimate question of actual malice.

The Broad View of Independent Review

Media interests have generally argued that the independent review rule translates into a requirement for de novo review.[31] The basis for this argument stems from the requirement in Sullivan to "make an independent examination of the whole record"[32] and Justice Stevens' statement in Bose that "First Amendment questions of 'constitutional fact' compel this Court's de novo review."[33] Under this broad view, the Bose decision sanctioned independent review as to findings of underlying facts, evaluations of credibility, and the drawing of inferences. In other words, no deference at all should be accorded any finding germane to actual malice. Proponents of the broad view argue that there is ample evidence to conclude that juries cannot be relied on to come to the correct verdict in libel cases, be it because they cannot comprehend the law,[34] may be prejudiced against media interests,[35] or routinely fail to take into consideration the larger values at stake, such as the need to prevent chilling effects on the press.[36] Clearly the reversal rate of jury verdicts for libel plaintiffs suggests that some or all of these factors exist in many cases.

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[29] Id. at 519 (Rehnquist, J., dissenting). See Herbert v. Lando, 441 U.S. 153, 170 (1979).

[30] Id. at 515.

[31] Anderson, supra note 19 at 495. When a reviewing court engages in de novo review, it makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for the plaintiff.

[32] Sullivan, 376 U.S. at 285 (emphasis added).

[33] Bose 466 U.S. at 508, n.27. In addition to the need to protect constitutional values, the Court in Bose identified two other reasons for reviewing actual malice determinations--the

An additional problem leading to support for the broad view stems from the use of general verdicts in libel trials. In many cases an appeals court panel may have only the jury's determination that the statements at issue were false, defamatory

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common-law heritage of the rule which assigns an especially broad role to the judge in applying it to specific factual situations and the status of the actual malice rule as a constitutionally-based but, nevertheless, judge-made rule of law given meaning through the evolutionary process of common-law adjudication. Id. at 502.

[34] See, Note, Model Jury Instructions for the "Actual Malice" Standard, 39 Rutgers L.Rev. 153, 156 (1986).

[35] See, e.g., Newton v. National Broadcasting Co., Inc., 930 F.2d 662, 671 (9th Cir. 1990) (First Amendment values will be subverted by a local jury biased in favor of a prominent local public figure against an alien speaker who criticizes that local hero).

[36] See, e.g., Ollman v. Evans, 750 F.2d 970, 1006 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 471 U.S. 1127 (1985) (evidence is mounting that juries do not give adequate attention to limits imposed by First Amendment).

and made with actual malice. This forces the appeals court to, in essence, manufacture jury findings and inferences which the jury could have made or must have made in deciding in favor of the plaintiff.[37] If the court then deferentially reviews these manufactured findings of fact, credibility determinations and inferences (although they are not actually part of the record), it may be less likely to set them aside as inadequate proof of actual malice because they were actually constructed by the appellate court based on only the general verdict.

The Narrow View of Independent Review

Those supporting the narrow application of independent review argue that sweeping appellate court review effectively eviscerates the role of the jury. Wholesale substitutions of jury determinations by a reviewing court would, in their view, make the jury trial "little more than a necessary hurdle en route to the real trial by the judge."[38] Such abrogation would essentially vest appellate courts with original jurisdiction in libel cases. Under this view, Bose does not alter the traditional rules governing the review of jury verdicts and thus "judicial deference is constitutionally mandated to presumed jury findings of underlying facts, evaluations of credibility, and the drawing of inferences."[39]

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[37] In a federal district court bench trial, the judge will make specific written findings of law and findings of fact.

[38] Wayne Newton Takes His Case to Supreme Court, BROADCASTING, Aug. 12, 1991, at 30.

With regard to the Court's pronouncements that the entire record should be reviewed by the appellate court, supporters of the narrow view contend that the Bose decision addressed only the ultimate question of actual malice, demonstrated by its reliance upon the distinction between questions of fact and questions of law. The Court in Bose specifically stated:

> Indeed, it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a '*de novo*' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff.[40]

In addition, the Court in Bose observed that examination of the entire record is not forbidden by Rule 52(a), and is in fact expressly contemplated by the rule.[41] In the final analysis, it becomes a question of the proper intensity of the appellate court's review.

Harte-Hanks Communications v. Connaughton

The latest word from the Supreme Court on the issue of independent review was delivered in Harte-Hanks Communications v. Connaughton,[42] a 1989 public person libel case in which the Court upheld a $200,000 jury verdict against a small newspaper. In ruling for the plaintiff, the Sixth Circuit Court of Appeals had interpreted the Bose position on independent review very narrowly.[43] It rejected the idea that independent review required an independent resolution of subsidiary facts. It held that such subsidiary facts, including inferences drawn from credibility determinations, were subject only to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). In a two-step approach, the Sixth Circuit first examined the record to determine if the jury's resolution of the subsidiary facts was clearly erroneous. It identified eleven subsidiary facts with which the jury could have supported its actual malice finding and held that such findings were not clearly erroneous. It next proceeded with what it considered to be the Bose-required independent review, a "second look" that included checking the entire record to correct errors of law, including errors infecting mixed findings of law and fact, and examining whether the jury's findings of fact were predicated on a misunderstanding of a governing rule of law.[44] After weighing the cumulative impact of the subsidiary facts on independent review, the court held that there was clear and convincing evidence of actual malice.[45]

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[39] Tavoulareas v. Piro, 817 F.2d 762, 777 (D.C. Cir. 1987) (en banc), *cert. denied*, 108 S.Ct. 200 (1987).

[40] *Bose*, 466 U.S. at 514, n.31.

[41] *Id*. at 499. "... [A] 'finding is "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed.'" (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)) (emphasis in original).

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[42] 109 S.Ct. 2678 (1989).

[43] Connaughton v. Harte Hanks Communications, 842 F.2d 825 (6th Cir. 1988).

[44] Id. at 845.

In a unanimous decision written by Justice Stevens, the U.S. Supreme Court affirmed the court of appeals. But the Court took a somewhat different approach to the question of independent review. It rejected the Sixth Circuit's reliance on the eleven subsidiary facts that the jury may have found as too speculative, choosing instead to rely on three testimonial-based claims presented by the newspaper that jury must have rejected.[46] Noting that it had accepted the jury's findings that the newspaper's testimony on these issues was not credible, it undertook a review of the evidentiary record. Considering the jury's "accepted" findings alongside the "undisputed" evidence, the Court concluded that there was clear and convincing evidence of actual malice.[47]

What is unclear, however, is whether the Court's review of the evidence underlying the testimonial-based claims and the "undisputed" evidence that the jury "must have rejected" was based on the clearly erroneous standard or truly de novo examination of the entire record.

The Harte-Hanks decision stressed the importance of the independent review standard established in Sullivan, that reviewing courts must consider the factual record in full to decide whether the evidence is sufficient to cross the constitutional threshold of clear and convincing proof of actual malice.[48] But it also explicitly stated that juries' credibility determinations are to be accepted unless clearly erroneous.[49] The Court noted that it had accepted in Bose the district court judge's finding that the key witness's testimony was not credible, explaining that it had been unwilling to infer actual malice from the witness's refusal to admit that a mistake had been made. Like Bose, the Harte-Hanks decision failed to clarify what standard governs the review of other subsidiary fact findings from which juries can infer actual malice.[50]

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[45] Id. at 855.

[46] Harte-Hanks, 109 S.Ct. at 2697.

[47] Id.

Justice Scalia, in a concurring opinion, labeled as "peculiar"[51] the manner in which majority opinion resolved the independent review question. He noted with approval that the majority had adopted the most significant element of the Sixth Circuit's approach--accepting the jury's determination of at least the necessarily found controverted facts rather than making an independent resolution of the conflicting testimony.[52] Justice Scalia characterized the scope of the majority's evidentiary review as limited to whether the jury could reasonably have reached its conclusions, rather than purporting to be exercising its own independent judgment on the permissible conclusions to be drawn from the testimony.[53]

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[48] Id. at 2695.

[49] Id. at 2696.

[50] Anderson, supra note 19 at 495, n.22.

[51] Harte-Hanks, 109 S.Ct. at 2701 (Scalia, J., concurring).

[52] Id. at 2701.

Justice Scalia also took issue with the majority's reliance on the identification of three facts that it claimed the jury must have found in order to conclude that the paper acted with the requisite actual malice. In his view, even one of the three facts would have provided a sufficient basis for clear and convincing proof of actual malice. Justice Scalia endorsed the Sixth Circuit's analysis in its entirety and said he would limit reviewing courts' independent assessment of whether actual malice was clearly and convincingly proved with the assumption that the jury had made all the supportive findings for the plaintiff that it reasonably could have made.[54]

Justice Scalia identified the "nub of the conflict," which he recognized as being "of overwhelming importance in libel actions against public figures,"[55] as whether

> ... the trial judge and reviewing courts must make their own 'independent' assessment of the facts allegedly establishing malice; or rather, ... that they must merely make their own 'independent' assessment that, assuming all of the facts that could reasonably be found in favor of the plaintiff were found in favor of the plaintiff, clear and convincing proof of malice was established.[56]

Independent Review in Appellate Courts

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[53] Id.

[54] Id. at 2702.

[55] Id. at 2701.

[56] Id. (emphasis in original).

Following the Court's decision in Bose, both federal and state appellate courts struggled with the scope of independent review, often decrying the lack of a clear explanation of the issue.[57] The Court's decision in Harte-Hanks seems to have done little to stem the confusion.

The Sixth Circuit's decision in the Harte-Hanks case provides an example of the extremely narrow view of independent review. The Sixth Circuit took the position that independent review was limited to a review of the jury's ultimate finding of actual malice, rejecting the position that independent review required an independent resolution of subsidiary facts that might be probative of actual malice. These subsidiary facts, including inferences drawn from credibility determinations, were subject only to the clearly erroneous standard of Rule 52(a).

The scope of independent appellate review was also the major focus in Tavoulareas v. Piro.[58] The case was brought by the president of Mobil Oil and alleged that he and his son were defamed by a story in the Washington Post that said, among other things, that the president had used his influence to "set up" his son in a shipping firm whose business included a multi-million dollar management services contract with Mobil. After a jury trial, the District Court judge awarded judgment notwithstanding the verdict to the newspaper defendant.[59] On appeal, a divided panel reversed the judgment n.o.v.[60] It held that Bose required independent review only of the "ultimate fact" of actual malice but not the preliminary factual findings upon which the ultimate finding of actual malice was based.[61] The full court vacated and set the case for rehearing en banc.[62]

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[57] See, Connaughton v. Harte Hanks Communications, Inc., 842 F.2d 825, 841 (D.C. Cir. 1988).

[58] Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987) (en banc), cert. denied, 108 S.Ct. 200 (1987).

By a seven to one vote, the full panel concluded that the article was substantially true and upheld the district court's grant of judgment n.o.v.[63] While the proper scope of independent review under Bose was the central focus of the arguments by both parties, the court dodged the issue by claiming to apply traditional j.n.o.v. standards[64] in finding that the district court's verdict for the newspaper had been correct:

> What is disputed is whether Bose went further and sanctioned independent review as to findings of underlying facts, evaluations of credibility, and the drawing of inferences. It is this issue ... that the court need not decide. Sailing into these uncharted waters is unnecessary to the proper and principled

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[59] Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983), aff'd in part and rev'd in part sub nom., Tavoulareas v. Piro, 759 F.2d 90, (D.C. Cir.), vacated for rehearing en banc, 763 F.2d 1472 (D.C. Cir. 1985), aff'd en banc, 817 F.2d 762 (D.C. Cir.), cert. denied, 108 S.Ct. 200 (1987).

[60] Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985).

[61] Id. at 107-08.

[62] Tavoulareas v. Piro, 763 F.2d 1472 (D.C. Cir. 1985).

[63] Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987).

[64] Id. at 777.

disposition of this case.[65]

In dissent, Judge MacKinnon rejected the majority's claim that it had conducted a traditional j.n.o.v. analysis, arguing that the court had invaded the jury's function because it:

> ... in fact reweighs the evidence, overrides obvious jury determinations on credibility of witnesses, generally goes only about half-way in giving plaintiff the benefit of the inferences to which he is entitled, and thus refuses to find the underlying facts, as required, in the manner most favorable to the jury verdict.[66]

In a concurring opinion, Chief Judge Wald also rejected the majority's claim that it had decided the case without any special application of the post-Bose independent review standard.[67] Judge Wald claimed that the court did in fact reexamine and reject permissible inferences that the jury might have drawn. In her view, such reexamination is appropriate.[68] Judge Wald would have tackled the "knotty constitutional issue" regarding what constitutes independent review under Bose, so that the court could properly reach the conclusion as to the absence of actual malice.[69] Such clarification, Judge Wald stated, is badly needed in this volatile area of the law.[70]

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[65] Id.

[66] Id. at 810 (Wald, C.J., dissenting). Like Judge Wald, the Sixth Circuit U.S. Court of Appeals in Harte-Hanks specifically attacked the broad scope of review it felt had been applied in this case. Harte-Hanks, 842 F.2d at 840-42.

[67] Tavoulareas v. Piro, 817 F.2d at 804.

[68] Id. at 805.

[69] Id. at 804.

All told, it would appear that the en banc decision in the Tavoulareas case did indeed apply Bose independent review, and in a manner clearly reflecting a broad scope. As Plave has noted:

> The facts of the case were strikingly complicated and conflicting; it would not be an easy task for commentators to decipher them and to determine whether the court came to the proper conclusion. But it is evident that the court did, in fact, apply Bose in its review of facts, witness credibility, and inferences pertinent to finding actual malice. The deference the court ostensibly extended to the jury's findings correlated only to those findings with which the court agreed. When the court disagreed with what the jury presumably could have found, whether objective facts, credibility of witnesses, or critical inferences, the court substituted its own evaluations.[71]

Other federal appellate courts, recognizing the difficulty of reconciling the proper scope of independent review under Bose, have also avoided a head-on consideration of the issue. For example, the 1987 decision by the Seventh Circuit U.S. Court of Appeals in Brown & Williamson Tobacco Corp. v. Jacobson[72] avoided the "open question"[73] over whether Bose allows review as to underlying facts, evaluations of credibility, and the drawing of inferences. It nevertheless applied a wide-ranging scope to its appellate review while avoiding "the difficult issues left unresolved by Bose,"[74] because, in its view, both deferential and de novo review yielded the same result in the case.[75]

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[70] Id. at 806.

[71] Plave, Tavoulareas v. Piro: An Extensive Exercise of Independent Judgment, 56 Geo. Wash. L.Rev. 854, 877 (1988).

[72] 827 F.2d 1119 (7th Cir. 1987), cert. denied, 108 S.Ct. 1302 (1988).

[73] Id. at 1128.

In Zerangue v. TSP Newspapers, Inc. the Fifth Circuit U.S. Court of Appeals, in reversing a grant of summary judgment, acknowledged the independent review requirement in Bose but held that the fact-finder retains its traditional role in the determination of facts.[76]

State courts have also struggled with the independent review issue. In McCoy v. Hearst Corp.,[77] the California Supreme Court reversed a jury verdict against the San Francisco Examiner because of insufficient evidence of actual malice. In an example of the broad view of independent review, the California Supreme Court stated that, under Bose, discredited testimony rejected by the jury could be "salvag[ed] from the heap of disbelief" and reinterpreted.[78] The California Supreme

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[74] Id. at 1129.

[75] Id.

[76] 814 F.2d 1066, 1070 (1987). See Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894, 898 (5th Cir. 1985) (Review limited to ultimate factual findings, declining to review credibility and subsidiary factual findings supporting ultimate determination of actual malice).

[77] 42 Cal. 3d 853 (1986), cert. denied, 481 U.S. 1041 (1987), petition to recall remittitur denied, (Calif. CtApp 1stDist. June 10, 1991), aff'd, (Cal. Sup. Ct. August 28, 1991), petition for cert. filed, 60 U.S.L.W. 3486 (U.S. Jan. 14, 1992) (No. 91-889).

[78] 42 Cal. 3d at 845. The California Supreme Court's reading of Bose as having rejected the credibility determination of the lower court was clearly in error. The Court repudiated this

Court rejected the position that it was bound to consider the evidence of actual malice in the light most favorable to respondents or to draw all permissible inferences in favor of respondents. It stated that it could and would "substitute its own inferences on the issue of actual malice for those drawn by the trier of fact."[79]

A much narrower reading of Bose in state court is found in Wanless v. Rothballer.[80] There, the Illinois Supreme Court concluded that appeals courts must perform "de novo" review of factual findings under Bose but said that it should not reexamine facts or make independent findings with regard to supporting evidence of actual malice.[81]

Independent Review following Harte-Hanks

Striking the proper balance over the scope of independent

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interpretation of Bose in Harte-Hanks, 109 S.Ct. at 2696, n.35. The plaintiff's second petition for certiorari to the U.S. Supreme Court argues that this misapplication of Bose was critical to the California Supreme Court's decision and that, had the proper standard of review been applied, it might well have affirmed the judgment. Brief for Appellant at 7.

[79] Id. at 846.

[80] 115 Ill.2d 158, 503 N.E.2d 316, 321 (1986), cert. denied, 107 S.Ct. 3213 (1987).

[81] Id. at 169. Other state courts have adopted a narrow interpretation of independent review in libel cases. See, e.g., Starkins v. Bateman, 250 Ariz. App. 537, 543, 724 P.2d 1206, 1212 (1986) (An appellate court is not equipped to undertake de novo review of underlying facts to determine if they support actual malice by clear and convincing evidence); Lent v. Huntoon, 143 Vt. 539, 470 A.2d 1162, 1170 (Vt. Sup. Ct. 1983) (reviewed evidence of malice in the light most favorable to plaintiff).

review has continued to present "a daunting task"[82] to federal and state appeals courts, even after the U.S. Supreme Court's decision in Harte-Hanks. For example, in Newton v. National Broadcasting Co.,[83] the Ninth Circuit reversed a $5.3 million jury award against NBC. Its approach applied different amounts of deference to various jury findings. The court concluded that Bose and Harte-Hanks had created a "credibility exception" to the Sullivan rule of independent review.[84] Presumptions of correctness about findings of fact that turn on credibility carry "maximum force,"[85] while the presumption applies with less force "when a factfinder's findings rely on its weighing of evidence and drawing of inferences."[86] As in the Tavoulareas case, the court in Newton undertook a painstaking recitation of the evidence; the actual scope of independent review was quite broad.

A strikingly different view of the independent review issue in the wake of Harte-Hanks is presented by the Kentucky Supreme Court in Ball v. E.W. Scripps Co.[87] In Ball, the court reinstated a jury verdict against The Kentucky Post in favor of a local prosecutor. In assessing the proper standard of independent review, the Kentucky Supreme Court read the Hart-Hanks decision as, if not co-extensive with the Sixth Circuit's extremely narrow decision, then nearly so.[88]

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[82] Newton v. National Broadcasting Co., 930 F.2d 662, 672, (9th Cir. 1990), cert. denied, 112 S.Ct 192 (1991).

[83] Id.

[84] Id. at 671.

[85] Id.

[86] Id.

[87] 801 S.W.2d 684 (Ky. Sup. Ct. 1990), cert. denied, 59 U.S.L.W. 3722 (1991).

Conclusions

There is at present no uniform approach by federal or state courts to the scope of independent review in libel cases. Courts appear wary to directly confront the issue. When the issue is addressed, there is often considerable disagreement about the appropriate method of analysis.

Overall, it seems that most appellate courts are applying the broader view of independent review but often under the guise of deference to lower court findings. As Rodney Smolla pointed out about the Tavoulareas case:

> ... the court was deferential only with regard to basic preliminary facts, and only with regard to purely factual inferences--inferences, for example, as to what particular actions or statements establish concerning basic motives. The court refused, however, to give any deference to the mixed factual and legal inferences that could be drawn from these facts.[89]

The Ninth Circuit in the Newton case did essentially the same thing. And while it acknowledged the "credibility exception" it found in Harte-Hanks, it also emphasized that a jury's findings that a journalist's sources were not credible must be interpreted in terms of the credibility that the journalist bestowed--correctly or incorrectly--on those sources.

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[88] Id. at 689.

[89] SMOLLA, supra note 6, sec. 12.09[4] at 12-46.

On factual issues not involving witness credibility, the Ninth Circuit extended less deference. Other courts have taken a significantly narrower view.

Further clarification from the Supreme Court is essential, but fraught with danger for media defendants. Would a majority of the present Court subscribe to a sweeping, completely de novo approach to independent review favored by press interests? At least four Justices seem partial to a significantly narrower view. Concurring in Harte-Hanks, Chief Justice Rehnquist and Justices White and Kennedy said they viewed the Court's opinion as consistent with the opinion of Justice Scalia, who would have adopted the Sixth Circuit's analysis in its entirety. Considering that Justice O'Connor joined Chief Justice Rehnquist's dissent in Bose, perhaps the best that may be hoped for is an intermediate view. Such an approach "drive[s] a wedge between preliminary facts and inferences at a very rudimentary level and the mixed law and fact evaluations upon which the actual malice standard really rests."[90]

A broader view of appellate review is preferable. The paramount goal of independent review is to ensure that cases are correctly decided so that constitutional values remain protected. This is clearly the course charted by the Supreme Court in Sullivan and Bose. Although Monaghan criticized the Court's decision in Bose for charging appellate courts with an absolute "duty" to perform review, he correctly interpreted the Court's mandate:

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[90] SMOLLA, supra note 5, sec. 12.09[4] at 12-48.

> An appellate court cannot content itself with accepting the results of a 'reasonable' application of admittedly correct legal norms to the historical facts. The court's responsibility is to scrutinize the record and marshall the evidence to see if it yields the characterization put on it by the court below.[91]

This is not to say that juries are superfluous to libel litigation. The actual malice standard, in addition to being an ultimate issue of constitutional fact, requires an assessment of the defendant's state of mind. An appellate court's exercise of independent review should not include reversing a jury verdict simply because it would have decided the matter differently. Its role is to judge the sufficiency of the evidence based on a thorough examination of the record and apply these facts to the legal standard.

One way in which trial judges can preserve a comprehensible record of jury findings is to routinely employ special verdicts in libel cases.[92] Special verdicts can provide judges with important assistance in understanding what a jury has done and why. Juries could respond to separate interrogatories regarding alleged defamatory statements of fact and alleged facts from which actual malice might be inferred. Special verdicts appear to work well.[93] As Eldred has noted, "[a]rmed with a detailed record, an appellate court has a basis for making its own determination whether the facts prove actual malice with clear and convincing evidence."[94] As a policy matter, it may be desirable to require the use of special verdicts in all jury-based libel trials. One public plaintiff has argued, unsuccessfully, that such special interrogatories are required by the First and Fourteenth Amendments.[95]

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[91] Monaghan, supra note 10, at 242.

[92] Special verdicts are governed by Rule 49(a) which provides that:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In the event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence...

Fed. R. Civ. P. 49(a).

The teaching of the Sullivan case is that libel litigation is distinct from ordinary civil litigation because of the precious constitutional liberties involved. Resolution of the independent review issue should begin by recognizing that "[t]he Constitution may be just as easily subverted by manipulation of the 'preliminary' facts in the record as by manipulation of the ultimate conclusions."[96] Such concerns should be considered by the Court in clarifying the proper scope of review. By striking the proper balance, the Court can suitably preserve the First Amendment values involved in libel litigation.

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[93] Forston, Sense and Non-Sense: Jury Trial Communication, 1975 B.Y.U. L.Rev 601 (1975).

[94] Eldred, Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases, 57 Fordham L.Rev. 579, 597 (1989).

[95] Ball v. E.W. Scripps Co., 801 S.W.2d 684 (Ky. Sup. Ct. 1990), cert. denied, 59 U.S.L.W. 3722 (1991).

[96] SMOLLA, supra note 6, sec. 12.09[4] at 12-48.

BROADCASTERS AND NON-COMPETE CLAUSES
WIN, LOSE OR DRAW A LAWSUIT

by

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BROADCASTERS AND NON-COMPETE CLAUSES: WIN, LOSE OR DRAW A LAWSUIT

In a time when broadcast television viewership is declining and advertising revenues are soft, station managers are searching for ways to hold market share and beat competition. The post-employment non-compete covenant in a broadcast employee's contract is one tool in the employer's box. The covenant, which attempts to exert control over a departing employee's next job is often included in the contract, but is not always enforced. These covenants need to be drafted carefully. Overbroad drafting of covenants can yield costly, ineffective, and even distressing results.[1]

Covenants not to compete are contract provisions in which one party (for our purposes the employee) agrees not to engage in a competing trade or business with the other party (the employer.) These covenants are generally ancillary to either an employment contract or a contract for sale of a business. Covenants ancillary to employment contracts fall into one of three basic categories: general covenants not to compete, covenants not to solicit customers, and covenants not to disclose confidential information or trade secrets. The category of particular interest to the broadcast manager and the on-air employee is the general covenant not to compete.[2] These covenants typically limit the employee from performing specific duties in competition with a former employer for a specific period of time, in a specific geographic area.

The validity, and reliability, of covenants not to compete is a matter of substantial uncertainty. Some states, by law, either prohibit covenants entirely, or allow them only in certain instances, such as ancillary to the sale of a business. The majority of states, however, follow the common law rule of reason - covenants not to compete are enforceable if they are reasonable in duration, geography, and duties. Therein lies the rub. The guidelines are somewhat vague - what may be reasonable to one judge in a given jurisdiction may seem wholly inappropriate to a judge in another jurisdiction. Because only a handful of cases involving broadcast employees and covenants not to compete has been reported, judges looking for guidance have little to go on in this area. They often end up drawing on cases from other fields that may or may not have much in common with broadcasting, or relying on their own sense of reasonableness. This ad hoc, case by case approach has, at times, done more to foster confusion than relieve it. The predictability factor in cases involving broadcast employee covenants has been rather low.

This chapter is an outgrowth of research into the current state of the law. It matched the law with with covenants actually being written in broadcast employee contracts. The matrix suggests guidelines for writing sound post-employment non-compete covenants in talent contracts.

Under the rule of reason, developed by American courts nearly a century ago, and widely used today, courts take into account the employer's need to have his business protected, the hardship the employee will endure if she is restricted, and the harm to the public interest in having the covenant enforced.[3] Judges specifically evaluate the reasonableness of the non-competition clause in terms of duration, geography, and scope of duties.[4]

Essential to the conclusion that the employer needs to have his or her business shielded from competition is a finding that the employer has a protectable business interest. Traditionally, a legitimate or protectable business interest included the goodwill accompanying the sale of a business, client lists, and trade secrets regarding the employer's business. Today, the list includes the uniqueness of the employee's services - an aspect of particular interest to broadcast managers.[5] If the employer can demonstrate harm or the potential for it to his business interest, he likely will be successful in having a reasonable covenant not to compete enforced against the employee.

The idea that an employee's uniqueness is a protectable business interest that the employer can restrain after the employee has departed developed from employee contract cases where the issue was the remedy for breach of contract while the employee was still working for the employer. The celebrated case that stands for this proposition is Lumley v. Wagner.

Wagner was a well-known opera singer who entered into a three month engagement to perform at the opera house of Mr. Lumley. She was to appear there, and nowhere else, during her contract. Wagner got a better offer before the end of her contract with Lumley and set off to sing at a competing opera house. Lumley went to court and asked for specific performance of Wagner's contract, that is, that the singer be ordered back into his establishment to fulfill her deal. The court understood Lumley's plight, but was unwilling to require her to perform. Instead, it ordered Wagner into silence for the remainder of her agreement with Lumley. She could either sing for the opera house with which she had a contract, or not at all.[6]

As Lumley shows, the remedy for breach of a contract while still employed is an injunction that keeps the unique employee for working for another. The reason for the injunction is the employee's talents are unique. What was originally the reason for injunctive relief - an employee's uniqueness - has now been added to the list of protectable business interests. Because uniqueness is regarded as a protectable business by most courts today, it is a legitimate reason for enforcing a post-employment non-compete covenant. And the remedy for breach of the post-employment non-compete covenant is an injunction.

Determining that a broadcast employee is "unique" can be problematic. Courts are increasingly accepting the idea that covenants are enforceable "where an employee's services are unique or extraordinary and the covenant is reasonable."[7] There is some argument, however, that the law reserves the "unique and extraordinary" label for superstars like Joe Montana and Luciano Pavarotti.[8] It may be, not surprisingly, more difficult to convince a judge that a general assignment reporter provides a unique and extraordinary service.

What, then, are courts identifying as a broadcaster manager's protectable interest in on-air talent uniqueness? In drawing on language from cases that do not involve broadcasters, courts have ruled that if the employee's services are "deemed 'special, unique or extraordinary,' then the covenant may be enforced by injunctive relief."[9]

The court in Clooney v. WCPO-TV[10] took that phrase, and expanded it, when it held that WCPO-TV could enforce a covenant to keep Clooney, a highly promoted daily program host, from performing for a competitor for one year within a 100 mile radius.[11] In its opinion, the appeals court declared that Clooney's services were of a "special, unique, unusual, extraordinary and artistic character which gives them a peculiar value, the loss of which cannot be reasonably and adequately compensated for..."[12] It is fair to say that a broadcast employee's skills and uniqueness can be considered a protectable business interest for the station management.

An on-air employee's uniqueness is not the only protectable business interest a broadcast manager has in the employee. Courts have also determined that employers have protectable business interests in talent in addition to services of "special, unique, unusual, extraordinary and artistic character." Judges have acknowledged that television stations have a protectable business interest in the image the stations project to the public.

In the case of John Beckman, an Atlanta meterologist who wanted to go from WSB-TV to WXIA-TV in the same market, the Georgia Supreme Court agreed with the lower court that a covenant restraining Beckman for 180 days within 35 miles of WSB's Atlanta studio was enforceable. The court determined that "WSB-TV would be injured by allowing a competitor to take advantage of the popularity of a television personality which WSB-TV had expended great sums to promote before WSB-TV had time to compensate for loss of that personality."[13] The court went on to find "that WSB-TV has a legitimate and protectable interest in the image which it projects to the viewing public."[14] The promotional expense in developing an image in the market is a protectable business interest.

The experience of broadcast employers who go to court to enforce post-employment non-compete covenants and employees who look to have them struck down is mixed. To some extent, the outcome of the case depends on the jurisdiction in which the case is heard. A majority of states adhere to the common law that requires judges to apply a reasonableness test while a minority of states have legislation that either prohibits enforcement of non-compete clauses altogether or sets a different standard for their enforcement.

There are not many reported cases involving suits over non-compete covenants in broadcast employee contracts, but those on record do provide some guidance to parties writing these contracts.[15]

In Cullman Broadcasting Co. v Bosley[16], an Alabama appellate court overturned a lower court and let a radio disc jockey's non-compete covenant stand. The terms of the covenant were one year, in the county, performing in the same capacity. The appellate court took note that the talent had voluntarily signed the agreement, and that the "broadcasting company possessed a substantial right in its own business sufficiently unique to warrant the type of protection contemplated by the non-competition agreement."[17] The court also recognized that the employer had spent a substantial amount of money in promoting the disc jockey, and concluded that it was not unreasonable to have him sit out a year in the market. "Therefore, we do not deem it unconscionable for a broadcaster to seek to restrain a former announcer from identifying a different broadcaster and conveying a different message."[18] Thus, the disc jockey could not go to a different broadcaster in the same county and convey a different message for the period of one year.

As mentioned above, the Georgia Supreme Court looked favorably upon a broadcaster's efforts to restrain a departing meterologist. The justices, in Beckman v. Cox Broadcasting, factored in "the employer's time, monetary investment in the employee's skills, and the development of his craft" at the same time considering "the harm the employer would suffer if the employee were to compete against him within the time, territory and capacity restricted by the covenant."[19]

It is important to point out that there is not unanimity in the view that employers can claim their investment in an employee's skills and development as a protectable business interest. In his article on post-employment restraints Professor Harlan M. Blake suggests that without "special circumstances the risk of future competition from the employee falls upon the employer and cannot be shifted, even though the possible damage is greatly increased by experience gained in the course of employment."[20] Blake does qualify his statement by adding that a court may find that "something over and above normal training" may allow it to then consider "the total 'investment' the employer has made in the training process, as well as the experience and background" the employee brings to her job.[21] The "something" above and beyond normal training may be full and active promotion, and special coaching.

The notion that an employer can put restraints on an employee whose services are of a "special, unique, unusual, extraordinary and artistic character" was central in Clooney v. WCPO-TV. Given these services (and the skills upon which they draw), the court determined that Scripps-Howard Broadcasting Co., owner of WCPO-TV, was entitled to protection. It found, in the case of Clooney, that a limitation on employment at another television station for one year within 100 miles performing the same services as he was performing for WCPO-TV was not unreasonable given that "the restraint is not beyond that reasonably necessary for the protection of the employer's business, is not unreasonably restrictive upon the rights of the employee and does not contravene public policy."[22]

An Ohio court, in an earlier case, also stated that broadcast talent is, by its very nature, unusual and unique. The majority decided in Skyland Broadcasting v. Hamby[23] that a limitation of eight months for 35 miles from the two stations owned by Skyland was acceptable, taking note that the radio announcer was a specialist of great value in his field.[24]

> "The Court recognizes the unusual nature of radio broadcasting, its relationship with the listening public, and the unusual and unique nature of its service and the service of its performers and employees who are active in this medium of entertainment."[25]

There is a caveat with regard to "uniqueness." While courts accept that an employee's uniqueness creates a protectable business interest, defining it is another matter. One commentator pointed out that its definition escapes precise delineation, suggesting it is simpler to assert what it isn't. She represents that:

> "An employee must be more than valuable, more than a key person or president of the business, and must enjoy more than a special relationship with the business customers, even though the employee may be the 'sole liaison between the company and its customers' and must be more than cognizant of the customers' idiosyncratic demands."[26]

Conceivably, it would not be difficult for some courts to find a broadcast talent in the above description, and suggest she is not "unique" enough to meet the standard.

In addition, there must be some probability of harm to the employer, or the court will not enforce a covenant not to compete. In KWEL v. Prassel[27], the court allowed that the non-compete covenant in a radio personality's contract was reasonable in its terms - 12 months and a 75 mile radius performing the same services - but the broadcaster hadn't shown it stood to lose by the employee going to work for a competitor in the same market.[28] Simply to restrain a departing employee for the sake of restraint, absent any harm, is to punish. Punishment is not a goal of contract law.

Even if the employer has a right to restrain, courts want evidence that harm will likely occur if limitations are not enforced. The majority in Bennett v. Storz Broadcasting, a case involving an 18 month, 35 mile radius, same duties limit on a radio disc jockey, decided for the employee on grounds other than the terms of the covenant. But the opinion did underscore that post-employment covenants will not be enforced if the reasons for enforcing it are to dampen competition, or even punish the employee. Quoting an earlier court in Standard Oil Co. v. Bertelsen, the Minnesota Supreme Court justices offered that a "man's right to labor in any occupation in which he is fit is a valuable right" and that the right "should not be taken from him, or limited by injunction, except in a clear case showing the justice and necessity thereof."[29]

The New York Court of Appeals, in ABC v. Wolf, ruled that some showing of injury to the employer needed to be demonstrated before it will grant enforcement: "To grant an injunction in that [Wolf's] situation would be to unduly interfere with an individual's livelihood and to inhibit free competition where there is no corresponding injury to the employer other than the loss of a competitive edge."[30]

The employer also came a cropper in Wake Broadcasters Inc v. Crawford when a covenant restricted the talent for 18 months from working at any radio or television station within 50 miles of any outlet owned by Wake Broadcasters. The limitation included stations already owned by the employer, or those acquired during the 18 months following Crawford's departure. That, effectively, kept Crawford from working in six states and was a restraint broader than needed to protect the employer's business interest. The court also thought it was capricious, as the terms of the covenant required the employee to be a seer in order to know where Wake was going to operate next to determine what areas would be off limits.[31]

Just how long is long enough? In Richmond Brothers, Inc. v. Westinghouse Broadcasting Co., that question was put to the test. A radio talent agreed to a post-employment covenant preventing him from working anywhere in New England for five years after leaving WMEX. He left for Chicago, worked there for three years, then accepted an offer from WBZ to broadcast on both the Westinghouse radio and tv stations in Boston. Richmond Brothers cried "foul" and sued to enforce the covenant. The court said that three years was long enough. Beyond that, WMEX was unable to demonstrate that it had lost any advertisers since the employee's return to the market.[32]

In a somewhat related instance, the Alabama Supreme Court upheld a one year, 60 mile limitation on a television account executive.[33] The court noted that Charles Booth had sold time for WPMI for three-and-a-half years where he was responsible for 20 percent of the station's ad revenue. When Booth announced his resignation and made plans to move to WJTC in the same market, station management went to court to enforce the post-employment covenant not to compete. The lower court held, and the supreme court in Alabama agreed, that WPMI had a protectable business interest sufficient to sustain the restraint. While the basis of Booth's post-employment non-compete covenant turned more on the traditional ground of a client list, the 60 mile restriction fairly closely matched the station's coverage area. The court did, however, narrow the job limitation. It ruled that keeping Booth from working in advertising, other than selling time at a competing station, was too broad "thereby imposing an undue hardship on Booth."[34]

A recent case in Oakland County, Michigan that dealt directly with the enforceability of a broadcast talent's post-employment non-compete covenant should give broadcast management pause. It was the first time a Michigan court looked at a case under a new Michigan law that allows covenants to protect the employer's reasonable business interests.[35]

Catherine Leahan, a young reporter who aspired to be an anchor, arrived at WXYZ-TV, the Scripps-Howard station in Detroit, a little more than a year after graduation from the University of Michigan, with stops in Marquette, Michigan and Omaha, Nebraska. In September, 1987, WXYZ-TV offered her a three year contract at $42,000, with annual increases to $45,000 and $48,000.[36] The contract contained a post-employment non-compete clause.

Leahan assumed consumer affairs reporting duties within two years and also began substitute weekend anchoring. In the second year of her contract, station management, aware of her significance in the market and her potential to be a major force, presented her with a new three year contract that, according to Leahan, "with more money and promises to put all the station's resources behind her to build and promote her star potential as a future anchor personality."[37] After some discussion about the salary increases, Leahan approved a new three-year contract that contained a $5,000 increase beyond the salary scheduled for the third year of the old contract. The covenant in the new agreement also contained language "that her services to Channel 7 were of a 'special, unique, extraordinary, artistic and intellectual character which gives them peculiar value, the loss of which cannot be reasonably or adequately compensated for in damages in an action at law.'"[38]. Further, following her departure she was prohibited for one year from working at any station whose located within 150 miles of WXYZ-TV's coverage area. The prohibition on competing, according to the agreement, meant that she would not "'perform services as an on-air talent, newscaster, announcer, feature and/or news reporter, producer, narrator, analyst, writer, editor or consultant.'"[39] The ban extended beyond tv to cable and radio.

After the new agreement was in place, Channel 7 moved Leahan into the weekend 6 and 11 p.m. co-anchor slot. She continued to report on the consumer beat three nights a week, sometimes fronting her packages from the anchor desk. The station estimated that, during the first year of the new contract, it spent more than $1 million on Leahan. That sum included the "cost of promotional advertising, professional coaching and Leahan's salary."[40]

At the end of the first year of her new contract, Leahan gave notice that she was resigning, having tried to negotiate an increase in salary for the final two years of her agreement with WXYZ-TV. Discussions, through her agent, had revealed some interest in her on the part of two other stations in the market.

The trial court was faced with two issues. The first issue was the terms of the contract - was it one three-year contract or three one-year contracts. The second issue was the reasonableness of post-employment non-compete covenant. The second was intertwined to some extent with the first. If the court found there was a three-year contract, then Leahan, according to the station's view, was frozen out of the market for the two years remaining plus an additional year - the post-employment year. If the court found three one-year contracts, then the Channel 7 asked that she be prohibited from working for another broadcast or cable station within 150 miles for one year. The station reasoned, using many of the cases discussed above, that "Leahan easily qualifies as an 'exceptional and unique' television personality"[41] and that Michigan law allows "authorized courts to 'specifically enforce' reasonable non-competition agreements, such as the one present here, which protects an employer's 'reasonable competitive business interests.'"[42]

In a hearing in Oakland County Circuit Court on December 4, 1990, Judge Gene Schnelz listened to both the plaintiff Leahan, and the defendant WXYZ-TV, on cross summary disposition motions. It was a case that had generated some interest in the community and in the metropolitan news media. Several articles on the dispute had appeared in The Detroit News and the Detroit Free Press, and a crew from a competing local television station was in the courtroom. Even the introduction in the defendant television station's brief reflected the high profile of the case. "Money, talent, beauty, opportunity, blond ambition, ego and ingratitude," it began. "It has all the elements of a successful TV drama series. Instead, it's the story of the short, but meteoric, career of TV anchorwoman Catherine Leahan."[43]

Judge Schnelz, on the matter of the length of the contract, found three one year contracts "in which WXYZ has the option to terminate and also has the duty to exercise ... its option to renew for the next year,"[44] rather than a three-year contract.

The question of the post-employment non-compete covenant was dealt with directly. Judge Schnelz read from the Michigan law permitting such covenants to protect an employer's reasonable competitive business interest, if the covenant is reasonable in duration, geographical area and type of employment. He continued, "Then they [the legislature] modify it dramatically by saying, 'To the extent that any such agreement or covenant is found to be unreasonable, a court may limit the agreement to render it reasonable...'"[45]

The decision from the bench was swift. "And I do have the authority to say, 'I limit it. I think one year is an unreasonable time. Let's say ninety days off the market is more than enough for anybody given the circumstances.' And I would point out that coloring my thinking is the fact that you [WXYZ-TV] have gone ahead and procured other personnel and moved ahead quite swiftly in this regard."[46]

The court, recognizing that the law in Michigan allowed WXYZ-TV to reasonably protect its business interest, limited that protection to four months, which ended three weeks after the hearing. The judge was not swayed by station arguments that it had invested more than $1 million in salary, promotion and coaching Leahan, nor was he impressed by how quickly someone of her "uniqueness" has been replaced. The covenant was upheld, but radically limited. It was a hollow victory for broadcast management.

Given the frequency with which post-employment non-compete covenants are included in broadcast talent contracts, the lack of certainty in judicial decisions concerning them, and the potential for negative press in a business that puts great stock in image, not to mention the expense of litigation, it was important to survey not only the relevant statutes and case law, but also the covenants currently in talent contracts.

For this study, the general manager at every television station in the top 20 markets was asked to participate in a survey of post-employment non-compete covenants, including the terms used by the estations and their experiences with them. The managers were asked to include their on-air employees in the survey; they were sent surveys for themselves and surveys for distribution to their employees. One-hundred-and-one television stations were included in the survey; 101 questionnaires were sent to general managers and 2600 were sent for distribution to on-air employees. Assurances of confidentiality were given.

There was a significant reluctance by general managers to participate in the survey. Management at twenty-one of the stations surveyed wrote in response, declining to either take part themselves, or to distribute the surveys to their on-air employees. They offered a wide range of reasons for their non-participation.

Several of the general managers responding cited the confidential nature of the employee contracts as the basis for their withdrawal from the survey. Some indicated a willingness to join in but lacked the time and resources to do so. One saw no "value nor the ability ... to change what we believe is a very individual process." Another respondent signaled his outrage at the researcher's "intrusion into my business and particularly your planned questioning of my contracted employees." The CBS owned-and-operated television stations responded by printed form, through the Vice President of Finance, Planning and Station Services, that due to the number of "such questionnaires currently being circulated that to reply to all would be both onerous and time-consuming." Of the 101 stations contacted, nine chose to cooperate. Forty-one on-air talent at eight stations also responded.

While the number of responses was disappointing and not statistically significant, it does allow for an impressionistic sense the range of terms that appear in post-employment non-compete covenants. The unwillingness to participate in the survey does suggest the uncertainty and awkwardness management and employees alike have regarding these covenants. Much is unsettled in this arena. Even the National Association of Broadcasters, in a publication on contracts for broadcasters, leaves the terms for duration, geographic scope and duties post-employment blank on sample contracts.[47]

All nine of the management respondents indicated that their employees are under contract; five are corporate boilerplate contracts and four are union contracts. In addition to the underlying master contract, eight of the stations indicated that they also have a number of on-air employees under a personal services agreement.

The non-compete covenants vary somewhat in their terms regarding duration, geographic scope, and duties. One of the management respondents indicated the average duration of the non-compete covenant is less than three months. Two stations have covenants that limit departing employees for a period of three to six months; two from nine to twelve months, and two for twelve to eighteen months. The general manager of a tenth station in the San Francisco market chose to respond to the questionnaire through a separate correspondence. Employees' contracts at this station all contain a 45-day post-employment non-compete clause limited to the San Francisco-San Jose market.

The nine survey management respondents presented several different terms in non-compete covenants with respect to geographic area. Two stations have post-employment limitations within a 50 to 75 mile radius of the operation. Two others extend the zone to between 75 to 100 miles, while one other station has a prohibition that exceeds 150 miles. Four of the respondents either didn't know or indicated the question was not applicable.

In a separate inquiry, six stations replied that employees are restricted from working in the ADI (Area of Dominant Influence) upon departure; one indicated there was no such limitation and two offered no response.

On the matter of employee duties, six stations indicated that the post-employment non-compete covenants did not restrict talent from performing services beyond those currently performed. One respondent answered that the covenant's limitations on service were greater than duties presently performed; two stations indicated the question was not applicable.

Of the nine station managers responding to the survey, two had participated in litigation with an employee concerning a post-employment non-compete covenant. In both instances, the court had ruled in favor of the television station. One judge left the wording of the covenant unchanged, while the second judge significantly modified the covenant with regard to duration. For one station, the legal expenses were between $5,000 and $10,000. The other station incurred litigation costs of $80,000.

In separate interviews, two station managers offered views of the covenants, and their value to the stations. One manager saw the covenant as "protecting the company's investment in promoting and increasing on-air recognition, while keeping the employee from being stolen by the competition." The covenant, however, should reflect the talent's worth. Greater limitation should be placed on an anchor than on a general assignment reporter. More effective, he thought, would be for the company to have the first right of refusal to a competing offer made to the talent, coupled with a right to match.

The second general manager concurred that every agreement should be tailored to the needs and the value of the individual talent. He belief was that station on-air employees are now mainly specialists and not general assignment reporters, and broadcasters have a right to protect their interest in these individuals. "I wish we didn't have to do it [secure covenants], but today it's a high stakes business with agents who bring in different values from other markets. Sometimes we find ourselves held to another market's standards." But having to live with the covenants, he found that they are "invaluable to the company bevause they protect the company's interest, and they also create value in the individual."

The survey attempted to obtain responses from not only management, but also employees with regard to post-employment non-compete covenants. They, too, are parties to employment contracts, and their views are valuable.

As with the management response, the employee response was quite small. Employees received the survey only if management passed it on to them. Forty-one on-air employees at eight stations, each in a different market, chose to participate. The markets are spread across the top 20, and geographically distributed around the country. Fourteen respondents are anchors, 20 are reporters, and seven are anchor/reporters. Thirty-one indicated they have personal services contracts, two operated under a corporate master contract or "boilerplate", seven employees were covered only by union contract, and one was not under contract. Three-fourths of the employees have a post-employment non-compete clause in their contracts. The terms vary substantially.

With regard to duration of the restriction, one-third of the talent said that the limitation in their post-employment non-compete covenants is less than three months. For six of the respondents, the restriction is between three and six months. Two on-air employees cannot compete for six to nine months, and seven are proscribed for nine to twelve months. Twelve to eighteen months is the duration of the covenant for two employees, while one is prohibited from competing for more than 24 months. Three of the respondents were not aware of the duration of their covenants, and nine employees have no covenant.

The limits on the geographic area in which employees may offer their services post-employment ranges from 50 miles to more than 150 miles. Nine employees have covenants barring them from competing within 50 to 75 miles, six are restricted for 75 to 100 miles, four for 100 to 150 miles, and two employees cannot compete within 150 miles. Further, 28 responded that they are prohibited from performing their services within the ADI during the time set forth in the covenant.

A portion of the employees also indicated that the restriction regarding duties covers more functions than they are currently performing. Of the respondents 13 replied "yes" to the inquiry: "Does your post-employment non-compete clause prohibit you from performing duties, other than those you presently perform, for a competitor?" Nineteen replied "no", and the issue was not applicable to nine others.

None of those answering the survey had actually gone to court to have a post-employment non-compete clause invalidated, but the notion of litigation was a considered by some. Twenty-two percent either agreed or strongly agreed that they had decided not to challenge a non-compete covenant because, as the question was posed, "you were afraid that it might affect your ability to get another job in broadcasting." Of the remainder, one-third had no opinion, and one-third indicated the question did not apply to them.

The concern about challenging a post-employment non-compete covenant was echoed in statements appearing in a comment section. One respondent volunteered that, "The industry is very small when it comes to talent contracts, and the grapevine is very long - piss off one employer, and the rest will piss on you. The no-compete is part of the game, live with it, understand it, or sell shoes in Des Moines." Those comments were echoed by an anchor/reporter who felt "damned if you do, and damned if you don't. By signing, you strap on a ball-and-chain. But if I had rejected the contract [covenant], I could have kissed away my anchor hopes."

Another employee questioned the covenants' legitimacy believing they represent "prior (sic) restraint of trade and are illegal - but who's going to pay to challenge?" On the same issue of legality, one respondent wrote, "My lawyers have advised me a one year non-compete clause could be successfully fought in court." The employee added, "When I was faced with a 6 month non-compete - the advice was 'don't waste your money, the station could tie you up in court for 6 months.'" Another broadcast employee in a right-to-work state speculated that a judge in that jurisdiction might be inclined to let an employee go to a competitor.[48]

From the matrix that holds both statutes and case law, employer and employee views of the covenants, we can retrieve information to help form guidelines for writing post-employment non-compete covenants that the parties can live with, and that are enforceable.

It is a settled proposition in most states that employers can restrain employees through post-employment non-compete covenants in order to protect a business interest. The employee's uniqueness may qualify as a business interest, as may the station's image, and the station's investment in promoting the employee, especially as part of a news team.

The covenants can be written to include restrictions with regard to duration, geographic scope, and duties. The limitations must, however, be reasonable. Excessive restrictions may be struck down entirely or, in some states, re-written by the court to render them reasonable. The remedy for an employee violating a post-employment non-compete covenant is an injunction that prohibits the employee from performing services restricted by the covenant.

There can be no hard and fast rules for non-compete covenants as long as they will be judged, case by case, on their reasonableness. Careful drafting is the best way for the parties to understand their agreement and to let the court know what the parties intended should the covenant be litigated. This research offers some suggestions for constructing post-employment non-compete covenants. These suggestions are not legal advice, but simply guidelines to approaching post-employment non-compete covenants.

1. Draft reasonable terms for duration, geographic scope, and duties. In general, courts look favorably on restrictions of one year or less, in the market as defined by ADI or comparable radius, and mirroring duties the employee is currently performing.

2. Define the business interest being protected. If the employee is truly unique, and her immediate move to a competitor would have a negative impact on the present station employer, the courts will likely protect that interest. Courts have also protected a station's image, and substantial promotional, coaching and advertising investment in an employee. Be realistic in the value attached to the investments made in an employee.

3. Post-employment non-compete covenants should not be written with the expectation that they will be re-written by the court if they

are too broad. If an employer drafts an unreasonable covenant in the hope that the court may modify it, the employer may be disappointed to find the judge, instead, refusing to enforce the covenant altogether. They should reflect the value of the investment and the importance of the talent, but no reach beyond.

4. Don't discourage or forbid the employee from having an attorney present. Courts recognize that post-employment covenants are often not the result of equal bargaining because the employer usually has the upper hand. As such, they scrutinize these covenants more carefully than, say, those attached to the sale of a business. Judges can become irate if they believe the employer has tried to keep his thumb on the scale by not letting the employee have access to an attorney.

5. Post-employment non-compete covenants must be supported by consideration. An employer who wants an employee to sign a covenant after she has already started working must give the employee something in exchange for the covenant, for example, a raise specifically due to the agreement. Otherwise, the courts might not hold the employee to the covenant.

6. Be able to demonstrate harm if litigating to enforce the covenant. If the court cannot see that the employee's departure for a competitor will harm the tv station, the court likely will not restrain the employee, even if the restrictions in the covenant are

reasonable. Therefore, an employer who quickly replaces a "unique" employee and is unable show how her departure will hurt the station may be hard pressed to convince the court his station needs protection. Contract law aims to make the parties whole, not to punish.

With an understanding of the legal foundation of post-employment non-compete covenants, and a reasonable approach to drafting them, broadcast employers should be able to protect the business interest that unique talent represent without becoming unwilling players in the expensive game of "Win, Lose, or Draw a Lawsuit."

1. "Enforceability of Contract Not to Compete," 61 ALR 3d 406.

2. Note, "A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and the Sale of Business Contracts in Georgia," *Emory Law Journal*, 31 (Summer, 1982): 636.

3. Note, 643.

4.Note, "The Post-Employment Covenant Not to Compete: An Old Dog Doing a New Trick," *Montana Law Review*, 49 (Summer, 1988): 359.

5. Jon Sylvester, "Validity of Post-Employment Non-Compete Covenants in Broadcast News Employment Contracts," *Hastings Communication/Entertainment Law Journal* 11 (Spring 1989): 432.

6. Sylvester, 426.

7. Judge Harold Baer, Jr., *Investor Access Corp. v. Doremus & Co, Inc*. Supreme Court of the State of New York, County of New York, 24534/88, 2.

8. Michael C. Lasky, "Non-Competition Agreements: Do the Handcuffs Come with a Key?" *The Business News Reporter*, 1991.

9. Paula Walter, "Employee Restrictive Covenants: To Restrain or Not to Restrain?" *Commercial Law Journal* 91 (Fall, 1986): 345 commenting on *Purchasing Associates v. Weitz* 13 N.Y.2d 267.

10. *Clooney v. WCPO-TV*, 300 NE2d 256 (1973).

11. "Covenant Not to Compete - Media Personality," 36 ALR 4th 1140.

12. *Clooney v WCPO-TV*, 300 NE2d 256, 257.

13. *Beckman v. Cox Broadcasting Corporation*, 296 SE2d 566 (1982).

14. Id.

15. 36 ALR 4th, 1140.

16. *Cullman Broadcasting Co. v Bosley* 373 So 2d 830 (1979).

17. 36 ALR 4th, 1140.

18. *Cullman Broadcasting Co. v. Bosley*, 373 So 2d 830.

19. *Beckman v. Cox Broadcasting Corp*. 296 SE 2d 566.

20. Blake, 652.

21. Blake, 652, fn. 85.

22. Clooney v. WCPO-TV, 300 NE 2d 256, 258.

23. Skyland Broadcasting Corp. v. Hamby 141 NE 2d 783 (1957).

24. 36 ALR 4th 1142.

25.Skyland Broadcasting Corp. v. Hamby, 141 NE 2d 783.

26. Walter, 345.

27. KWEL, Inc. v Prassel 527 SW 2d 821 (1975).

28. 36 ALR 4th, 1143.

29. Bennett v. Storz Broadcasting Co. 134 NW 2d 892, 899 (1965).

30. American Broadcasting Companies, Inc. v. Wolf 420 NE 2d 363 (1981), 368.

31. 36 ALR 4th, 1144.

32. Sylvester, 439.

33. Booth v. WPMI Television Company, Inc, 533 SO 2d 209 (1988).

34. id., 211.

35. The Michigan Antitrust Reform Act, 1984 Mich Pub Acts 274 (codified at MCL 445.771-778); amended in 1987 (MCL 445.774).

36. Defendant's Brief in Support of Motion for Summary Disposition at 4, Catherine M. Leahan v. Channel 7 of Detroit, Inc./ WXYZ-TV, No. 90-396693 CK (filed Nov. 6, 1990).

37. Id., 5.

38. Id., 9.

39. Id.

40. Id., 11.

41. Id., 28

42. Id., 31.

43. Id., 1.

44. Leahan v. Channel 7 of Detroit, Inc./WXYZ-TV, No. 90-396693 CK, slip op. at 13 (C. Mich. Dec. 4, 1990).

45. Id., 30.

46. Id.

47. National Association of Broadcasters, Getting What You Bargained For: A Broadcaster's Guide to Contracts and Leases (Washington, D.C., 1989), 18.

48. In fact, the courts in this state (Texas) have held that reasonable anticompetition clauses involving broadcast talent will be enforced. See KWEL, Inc. v. Prassel, 527 SW2d 821 (1975).